IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.10.2020
PRONOUNCED ON : 16.10.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE KRISHNAN RAMASAMY

Writ Appeal No.53 of 2020

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

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

3. Union of India
   rep. by its Secretary
   Ministry of Finance
   Department of Revenue
   North Block
   New Delhi 110 001.

4. Central Board of Excise and Customs
   815, Nehru Place, Market Road
   New Delhi 100 019. .. Appellants

Vs.

1. Sutherland Global Services Private Limited
   45-A, Velacherry Main Road

Vijayanagaram
Chennai 600 042.

2. Government of Tamil Nadu
rep. by its Secretary
State Tax Department
Fort St. George
Chennai 600 009.

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

Appeal under Clause 15 of the Letters Patent filed against the order dated 05.09.2019 made in W.P.No.4773 of 2018 on the file of this Court.

For Appellants/
Revenue : Ms.Aparna Nandakumar

For Respondent-1 : Mr.Raghavan Ramabathran
For M/s. Lakshmi Kumaran Associates

For Respondents
2 & 3 : Mr.Mohammed Shafhiq
Spl. Govt. Pleader

JUDGMENT

Dr.Vineet Kothari,J

The interesting and important question which arises in the present intra Court appeal from the judgment of the learned Single

Judge dated 05.09.2019 allowing the writ petition of the Assessee M/s. Sutherland Global Services Private Limited in W.P.No.4773 of 2018, is as to whether the Assessee is entitled to utilise and set off the accumulated unutilised amount of Education Cess (EC), Secondary and Higher Education Cess (SHEC) and Krishi Kalyan Cess (KKC), all jointly referred to as the "Cess" against the Output GST Tax Liability after the switch over of Indirect Taxation System to GST Regime with effect from 01.07.2017, which GST (Goods and Services Tax) levy subsumed within its fold 16 indirect taxes earlier leviable like Excise Duty, VAT, etc.

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 **01.07.2017** 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.

4. The controversy involved in the present case is about the set off, adjustment or utilisation of the Input Tax Credit of Cess paid at the time of manufacture or import by the Assessee, which provides Technical and Call Centre Services all over the country, namely as to

whether such Cess in the form of Education Cess, etc. can be adjusted against the Output GST liability under the provisions of CGST Act, 2017 (Central Goods and Service Tax Act, 2017).

5. The learned Single Judge, by a detailed discussion of the statutory provisions and relevant case laws, has held in favour of the Assessee that the Assessee was entitled to adjust such unutilised CENVAT credit carried forward in its Electronic Ledger, which was so lying unutilised as on 30th June 2017, to be adjusted against the Output GST Liability with effect from 01.07.2017 in terms of Section 140 of the CGST Act, 2017.

6. However, for the reasons to be discussed below, we have found ourselves unable to subscribe to the same view as that of the learned Single Judge and we find that there is a considerable merit in the present writ appeal filed by the Revenue and it deserves to be allowed.

7. Before coming to the reasons for our aforesaid conclusion, let us discuss the relevant provisions of the relevant enactments involved

in the present matter to understand the controversy in a better manner.

8. Section 140 of the CGST Act, 2017, which is most crucial for this case and which provides for the transitional arrangement for Input Tax Credit is quoted below for ready reference:

> "***Transitional arrangements for input tax credit.***
>
> ***140.*** *(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* [3]*[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*
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> *(iii) where the said amount of credit relates to goods*

manufactured and cleared under such exemption notifications as are notified by the Government.

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3. Inserted by the CGST (Amdt.) Act, 2018 (31 of 2018), dt. 30.8.2018, w.r.e.f. 1-7-2017.

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*(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 "**unavailed 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 [1][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.*

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1. Substituted for "sub-sections (3), (4)" by the CGST (Amdt.) Act, 2018 (31 of 2018), dt. 30.8.2018, w.r.e.f. 1-7-2017.

***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.*

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3. Substituted for "sub-sections (5)", ibid

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[1]*[****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)].*

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1. Inserted by CGST (Amdt.) Act, 2018 (31 of 2018), dt. 30.8.2018, w.r.e.f. 1.7.2017.

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8. Rule 117 of the CGST Rules, 2017, providing of furnishing of **Form No.GST TRAN-1** in terms of Section 140 is also quoted below for ready reference:

> ***Rule 117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-*** *(1) Every registered person entitled to take credit of input tax under section 140 shall,* ***within ninety days of the appointed day, submit a declaration electronically in FORM GST TRAN-1****, duly signed, on the common portal specifying therein, separately, the amount of input tax credit of eligible duties and taxes, as defined in Explanation 2 to section 140, to which he is entitled under the provisions of the said section:*
>
> ***Provided*** *that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days.*
>
> ***Provided further*** *that where the inputs have been received from an Export Oriented Unit or a unit located in Electronic Hardware Technology Park, the credit shall be allowed to the extent as provided in sub-rule (7) of rule 3 of*

the CENVAT Credit Rules, 2004.

(2) Every declaration under sub-rule (1) shall-

(a) in the case of a claim under sub-section (2) of section140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-

(i) the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub-section (8) of section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of section 140, furnish the following details, namely:—

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissible under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax [or entry tax] charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) ***The amount of credit specified in the application in FORM GST TRAN-1 shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT2*** *on the common portal.*

(4) (a) (i) ***A registered person who was not registered under the existing law shall****, in accordance with the proviso to sub-section (3) of section 140, be allowed to avail of input tax credit on goods (on which the duty of central excise or, as the case may be, additional duties of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, is leviable) held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of central excise duty.*

(ii) The input tax credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent. on such goods which attract central tax at the rate of nine per cent. or more

and forty per cent. for other goods of the central tax applicable on supply of such goods after the appointed date and shall be credited after the central tax payable on such supply has been paid:

***Provided** that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent. and twenty per cent. respectively of the said tax;*

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) The credit of central tax shall be availed subject to satisfying the following conditions, namely:-

(i) such goods were not unconditionally exempt from the whole of the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 or were not nil rated in the said Schedule;

(ii) the document for procurement of such goods is available with the registered person;

(iii) The registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2), submits a statement in FORM GST TRAN 2by 31st March 2018, or within such period as extended by the Commissioner, on the

recommendations of the Council, for each of the six tax periods during which the scheme is in operation indicating therein, the details of supplies of such goods effected during the tax period;

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in FORM GST PMT-2 on the common portal; and

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person."

9. The Ministry of Finance, Department of Revenue (Central Board of Indirect Taxes and Customs), New Delhi, issued a **Circular No.87/06/2019-GST** on **02nd January 2019** addressed to all Chief Commissioners and other Authorities clarifying the said provisions of CGST Amendment Act, 2018. The said Circular is also found to be relevant and therefore, it is quoted in extenso below.

"Circular No. 87/06/2019-GST

Dated 2nd January, 2019

F. No. 267/80/2018-CX.8

Government of India

Ministry of Finance

Department of Revenue

(Central Board of Indirect Taxes and Customs)

New Delhi

To

The Principal Chief Commissioners/ Chief Commissioners/Principal Commissioners/

Commissioner of Central Tax (All)

The Principal Director Generals/ Director Generals (All)

Sub: Central Goods and Services Tax (Amendment) Act, 2018- Clarification regarding section 140(1) of the CGST Act, 2017-reg.

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.

2. Therefore, in exercise of powers conferred under

section 168 of the Central Goods and Services Act (hereinafter referred to as "Act"), for the purposes of uniformity in the implementation of the Act, the Central Board of Indirect Taxes and Customs hereby directs the following:

3.1 The CENVAT credit of service tax paid under section 66B of the Finance Act, 1994 was available as transitional credit under section 140(1) of the CGST Act and that legal position has not changed due to amendment of section 140(1) on account of following reasons:

i) The amendment in provisions of section 140(1) and the explanations to section 140 need to be read harmoniously such that neither any provision of the amendment becomes otiose nor does the legislative intent of the amendment get defeated.

ii) The intention behind the amendment of section 140(1) to include the expression "eligible duties" has been indicated in the "Rationale/ Remarks" column (at Sl. No. 37) of the draft proposals for amending the GST law which was uploaded in the public domain for comments. It is clear that the transition of credit of taxes paid under section 66B of the Finance Act, 1994 was never intended to be disallowed under section 140(1) and therefore no such remark was present in the document.

iii) ***Under tax statutes, the word "duties" is used interchangeably with the word "taxes" and in the present context****, the two words should not be read in a disharmonious manner.*

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.

3.3 The expression "eligible duties" under section 140(1) does not in any way refer to the condition regarding goods in stock as referred to in Explanation 1 to section 140 or to the condition regarding inputs and input services in transit, as referred to in Explanation 2 to section 140.

4. Further, it has been decided not to notify the clause (i) of sub-section (b) of section 28 and clause (i) of sub-section (c) of section 28 of CGST (Amendment) Act, 2018 which link Explanation 1 and Explanation 2 of section 140 to section 140(1). This would ensure that the credit allowed to be transitioned under section 140(1) is not linked to credit of goods in stock, as provided under Explanation 1, and credit of goods and services in transit, as provided under Explanation 2. However, the duties and taxes for which

transition is allowed shall be governed by para 3.2 above.

*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.*

6. Trade may be suitably informed and difficulty, if any, in the implementation of this circular may be brought to the notice of the Board.

Yours faithfully,

(KUMAR VIVEK)

OSD (CX.3/8)"

Levies of different Cess like Education Cess, Secondary and Higher Education Cess, etc.

10. Finance Act No.2 of 2004 introduced the levy of Education Cess in Sections 91 to 94 of Finance Act, 2004, **at the rate of 2% which shall be charged as duty of Excise as the Education Cess on the excisable goods to fulfil the commitment of the Government to provide and finance universalised quality basic education**. The said provisions of Sections 91 to 95 in Chapter VI of

Finance Act, 2004 are also quoted below for ready reference.

*"**91. Education Cess.** - (1) Without prejudice to the provisions of sub-section (11) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, **a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalised quality basic education**.*

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the Education Cess levied under sub-section (11) of section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

***92. Definition**. The words and expressions used in this Chapter and defined in the Central Excise Act, 1944 (1 of 1944), the Customs Act, 1962 (52 of 1962) or Chapter V of the Finance Act, 1994 (32 of 1994), shall have the meanings respectively assigned to them in those Acts or Chapter, as the case may be.*

***93. Education Cess on excisable goods.** - (1) The Education Cess levied under section 81, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to*

as the Education Cess on excisable goods), at the rate of two per cent, calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) ***The Education Cess on excisable goods shall be in addition to any other duties of excise*** *chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.*

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

94. Education Cess on imported goods. *- (1) The Education Cess levied under section 81, in the case of goods specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975),* ***being goods imported into India, shall be a duty of customs*** *(in this section referred to as the Education*

*Cess on imported goods), **at the rate of two per cent calculated on the aggregate of duties of customs** which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under section 12 of the Customs Act, 1962 (52 of 1962) and any sum chargeable on such goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs, **but not including**—*

(a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act, 1975 (51 of 1975);

(b) the countervailing duty referred to in section 9 of the Customs Tariff Act, 1975 (51 of 1975);

(c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act, 1975 (51 of 1975); and

(d) the Education Cess on imported goods.

*(2) **The Education Cess on imported goods shall be in addition to any other duties of customs** chargeable on such goods, under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force.*

*(3) **The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on imported goods** as they apply in relation to the levy*

and collection of the duties of customs on such goods under the Customs Act, 1962 or the rules or the regulations, as the case may be.

***95. Education Cess on taxable services**. - (1) The Education Cess levied under section 81, in the case of all services which are taxable services, shall be a tax (in this section referred to as the Education Cess on taxable services) at the **rate of two per cent, calculated on the tax which is levied and collected under section 66 of the Finance Act, 1994** (32 of 1994).*

*(2) **The Education Cess on taxable services shall be in addition to the tax chargeable on such taxable services**, under Chapter V of the Finance Act, 1994 (32 of 1994).*

(3) The provisions of Chapter V of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, including those relating to refunds and exemptions from tax and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules, as the case may be.

THE SECOND SCHEDULE

[See section 88(1)]

Provision of the CENVAT Credit Rules, 2002 to be amended	***Amendment***	***Date of effect of amendment***
(1)	*(2)*	*(3)*
Explanation to *clause (b) of sub-rule (6) of rule 3.*	*In the CENVAT Credit Rules, 2002, in rule 3, in sub-rule (6), in clause (b), for the* Explanation, *the following* Explanation *shall be substituted, namely:-* *"*Explanation. - *For the removal of doubts, it is hereby declared that the credit of the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and paid on or after the 1st day of April, 2000, may be utilised towards payment of duty of excise leviable under the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);"*	*1st March, 2003*

Introduction of Secondary and Higher Education Cess

11. Next is the Secondary and Higher Education Cess introduced by the Finance Act, 2007, from Section 136 onwards. The said Cess was levied as the surcharge to fulfil the commitment of the Government to provide Finance and Secondary and Higher Education. This Cess was also liable to be collected in addition to any other duties of excise chargeable on such goods under the provisions of Central Excise Act, 1944 and also Education Cess imposed by Section 93 of the Finance (No.2) Act, 2004 quoted above. Similar SHEC was also imposed by Section 139 of the same Finance Act, 2007, at the rate of 1% to be collected in addition to the duty of customs on the imported goods as well as on service tax leviable under the provisions of 66 of the Finance Act, 1994. The provisions of the said SHEC is not again quoted as they are akin to the aforesaid provisions of levy of Education Cess.

12. Similarly, the Central Government imposed **Krishi Kalyan Cess** by Section 161 of the Finance Act, 2016, with effect from 1st June 2016 at the rate of 0.5% of the Service Tax payable on taxable

services, for the purpose of financing and promoting initiatives to improve agriculture or any other purpose relating thereto. The said Krishi Kalyan Cess was repealed with effect from 01.07.2017 only by the Taxation Laws (Amendment) Act, 2017.

13. The levy of Education Cess and Secondary and Higher Education Cess was however dropped and deleted by the Finance Act, 2015 by Section 153, of which, Section 95 of the Finance Act 2004, Education Cess was omitted and by Section 159, Section 140 of the Finance Act, 2007 was also omitted. The Krishi Kalyan Cess was however abolished only with effect from 01.07.2017 vide Taxation Laws (Amendment) Act, 2017. But, there was no claim of CENVAT Credit with regard to Krishi Kalyan Cess and the reason which apply to Education Cess and Secondary and Higher Education Cess will equally apply to Krishi Kalyan Cess also for the purpose of Section 140 of the CGST Act.

The relevant provisions of Central Excise Act and CENVAT Rules for availment and utilisation of CENVAT Credit

14. Section 37 of the Central Excise Act, 1944, provides the power of the Central Government to make Rules and various Clauses

of the Section 37 empowered the Central Government to frame the Rules with regard to various aspects of the Central Excise Law and our attention was drawn towards **Clause (xxviii)** thereof, which provides for Rules to be framed in regard to the lapsing of credit of duty lying unutilised with the manufacturer of specificied excisable goods on an appointed date and also for not allowing such credit to be utilised for payment of any kind of duty on any excisable goods on and from such date.

CENVAT Credit Rules 2004

15. Rule 3 of the CENVAT Credit Rules, 2004, provides that a manufacturer or a purchaser of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as CENVAT Credit) of the specified duties in that Rule 3, which included Education Cess and Secondary and Higher Education Cess in question. Sub-rule (7) of Rule 3 of CENVAT Credit Rules, 2004, specifically provided that CENVAT Credit in respect of Education Cess and Secondary and Higher Education Cess shall be utilised only towards the payment of Education Cess leviable on the taxable services only and not against the normal excise duty. Those CENVAT Rules, 2004 clearly

restricted the utilisation of Education Cess and Higher and Secondary Education Cess on the output tax on goods and services and not against the normal excise duty or service tax liability. It was not disputed before us that cross utilisation of CENVAT Credit in the form of Education Cess and Secondary and Higher Education Cess against normal service tax and excise duty liability was not allowed.

16. The controversy, however, arose because the Assessee claimed in the present case that the unutilised part of Education Cess and Secondary and Higher Education Cess lying to the credit of the Assessee in the Electronic Ledger continued even after the levies were omitted by the Finance Act, 2015, as aforesaid, up to 30th June 2017, when the switch over was made to GST Regime with effect from 01.07.2017 and therefore, a vested right came to accrue with the Assessee to utilise such unutilised CENVAT Credit of Education Cess and Secondary and Higher Education Cess against the output GST liability with effect from 01.07.2017. Since the Revenue Authority under GST negatived the said claim and asked the Assessee to reverse the CENVAT Credit in the form of Education Cess and Secondary and Higher Education Cess, the Assessee approached this Court by way of

writ petition which came to be allowed by the learned Single Judge by the order impugned before us now.

17. Before coming to our reasons for the conclusion that the Assessee is not so entitled to carry forward unutilised Education Cess and Secondary and Higher Education Cess as CENVAT Credit to be utilised against the output GST liability under the provisions of CGST Act, in terms of Section 140 thereof, let us note the rival contentions raised before us.

Contentions raised on behalf of Revenue/Appellant

18. Ms.Aparna Nandakumar, learned counsel for the appellant/ Revenue submitted that with the levy of Cess having been dropped in the year 2015 by the Finance Act, 2015, the unutilised amount of Education Cess and Secondary and Higher Education Cess which could not be set off by the Assessee during the contemporary period prior to 30th June 2017, cannot be allowed to be carried forward under the transitory provisions of Section 140 of the CGST Act, because it became a dead claim of the Assessee and since the levy of Cess was not continued after 2015 nor such levy was subsumed in the listed 16

taxes which were subsumed under the GST law, the credit in respect of such Cess could not be claimed against the Output GST liability. She emphasised that since Cess was collected for a specific and dedicated purpose by the Central Government and such levies imposed by the Finance Act, 2004 and 2007 respectively and the purpose of giving the input credit in respect of the same against the output Cess liability was only to remove the cascading effect and which is the bedrock of such Input Tax Credits in the indirect taxation system was not available, as Output Cess Liability ceased, therefore, the untilised portion of such CENVAT credit in the form of Education Cess and Secondary and Higher Education Cess became a dead claim after such levies were dropped in the year 2015 and unlike unutilised portion of CENVAT credit in the form of specified additional excise duty, customs duty, National Calamity Contingent Duty on inputs which were transitioned as per Section 140 of the CGST Act for the period from 01.07.2017 also, such unutilised Cess could not stand at parity with unutilised Input credit of specified excise duty and therefore, the claim of the Assessee in this regard was misconceived and learned Single Judge has erred in allowing the same.

19. The learned counsel for the appellant/Revenue relied upon several case laws to support her contention as was done before the learned Single Judge also, which will be discussed by us hereafter.

20. The written submissions filed by the appellant/Revenue was also taken on record and the same is re-produced below, which have been considered by us.

I. HISTORICAL BACKGROUND OF INTRODUCTION AND ABOLITION OF CESSES:-(EC,SHEC and KKC)

a. Education Cess (hereinafter referred as EC) was introduced vide Finance Act 23 of 2004. Section 91of Chapter VI of the Finance Act 23 of 2004 specifically provided that "there shall be levied and collected in accordance with the provisions of this chapter as surcharge for the purpose of Union, a cess to be called Education Cess to fulfil the commitment of the Government to provide and finance universalised quality basic education". Subsection (2) of Section 91 of the Finance Act 23 of 2004 specifically provided that the sum of money collected as Education Cess would be utilised for the purpose specified in sub section (1) after due appropriation made by Parliament by law.

b. Similarly Secondary and Higher Education Cess(hereinafter referred as SHE Cess) was introduced vide Finance Act 2007. Section 136 of chapter VI of the Finance Act 2007, provided that Secondary and Higher Education Cess would be levied and collected as surcharge and would be utilised to provide for the purpose of Secondary and Higher Education after due appropriation made by Parliament by law in this behalf.

c. Similarly Finance Act 2016 provided for the levy and collection of Krishi Kalyan Cess (hereinafter referred as KKC) to meet the needs of the agriculturists and farmers. Thus the three cesses were introduced for specific purposes and the same was collected by the Central Government and utilised only for those identified specified purposes.

d. The first proviso to Rule 3(7)(b) of the CENVAT Credit Rules 2004 provided that the credit of the Education Cess on excisable goods and on taxable services could be utilised either for payment of Education Cess on excisable goods or for the payment of Education Cess on taxable services.

e. The second proviso to Rule 3(7)(b) of the CENVAT Credit Rules provided that the credit of Secondary and Higher Education Cess on excisable goods and on taxable services can be utilised either for payment of Secondary and Higher Education Cess excisable goods or for the payment of Secondary and Higher Education Cess on taxable services.

f. Similarly Rule 3(7)(d) provided that the CENVAT credit pertaining to Krishi Kalyan Cess on taxable services levied under Section 161 of the Finance Act 2016 shall be utilised only towards the payment of Krishi Kalyan Cess on taxable services.

g. Thus from the inception of the Education Cess, Secondaryand Higher Education and Krishi Kalyan Cess the intention of the statute was to allow the credit utilisation of CENVATCredit pertaining to these cesses only as against the respective cesses levied on excisable goods or output taxable services. This position continued till 2015.

h. Thus cross utilisation of the Education Cess and Secondary and Higher Education Cess as against the output element of excise duty and service tax was never allowed.

i. Education Cess and Secondary Higher Education Cess

levied on excise duty and taxable services were abolished from the year 2015 by omission of Section 95 of the Finance Act 2004 and section 140 of the Finance Act 2007 vide Section 153 and 159 respectively of the Finance Act 2015.

j. Consequently Notification 14 of 2015 – Central Excise and Notification 15 of 2015 – Central Excise and Notification 14 of 2015 – ST and Notification 15 of 2015 – ST exempted all the goods and services from the levy of Education Cess and Secondary Higher Education Cess 01.03.2015 and 01.06.2015 respectively.

k. Thus after these two cut of dates, the levy of education cess and the levy of secondary higher education cess was completely wiped away from the statute book. In other words, the levy of education cess on excisable goods and taxable services remained in the statute book from 2004 to 2015. Likewise, the levy of SHE Cess remained in the Statute book from 2007 to 2015.

l. While so vide Notification No. 12 of 2015- CE-NT dated 30.04.2015 and Notification 22of 2015- CE-NT dated 29.10.2015 six provisos were added to Rule 3(7)(b) of the CENVATCredit Rules after the first two provisos. According to the newly added provisos the following position emerged :-

i. The credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the factory of manufacture of final products on or after 01.03.2015 could be utilised for the payment of central excise duty.

ii. The 50% balance credit of Education Cess and Secondary and Higher Education Cess paid on capital goods received in the factory of manufacture of final products in the financial year 2014-15 can be utilised for payment of central excise duty.

iii. The CENVATCredit pertaining to Education Cess and Secondary and Higher Education Cess paid on input services received by the manufacture of final products on or after 01.03.2015 could be utilised for the payment of central excise duty.

iv. The CENVATCredit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the premises of the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of service tax on any output service.

v. The 50% balance credit of Education Cess and Secondary and Higher Education Cess paid on capital goods received in the premises of the provider of output service in the financial year 2014-15 can be utilized for payment of service tax on any output service.

vi. CENVATCredit of Education Cess and Secondary and Higher Education Cess paid on input service in respect of which the invoice, bill, challan or Service Tax Certificate for Transportation of Goods by Rail is received by the provider of output service on or after the 1st day of June, 2015 can be utilized for payment of service tax on any output service.

m. The newly added provisos was a Special Purpose Vehicle for a limited period to give the benefit of cross utilisation as against excise duty and service tax only with regard to inputs and inputs services received on or after cut of date namely 01.03.2015 and 01.06.2015.

n. Notifications 12 of 2015 and 22 of 2015 were challenged before the Hon'ble Delhi High Court in the case of ***CellularOperators Association of India v UOI[Reported in 2018 (14) GSTL 522, (2018) 51 GSTR 338 (Del),MANU/DE/0710/2018].***

o. Thus the Hon'ble Delhi High Court upheld the

Notifications and held that the CENVATCredit of Education and Secondary Higher Education Cess which has been availed till the cut of date had lapsed to the Government and could not be cross utilised and could not be allowed to be cross utilised as against excise duty and service tax.

p. The appellant submits that in the light of the statutory provisions and the legal position enumerated above and in the light of the decision of the Hon'ble Delhi Court, the appellant herein submits the synopsis of the oral arguments made before this Hon'ble Court on 30.09.2020 and 01.10.2020.

II. SYNOPSIS OF LEGAL PROPOSTIONS:

LEGAL PROPOSITION I :- Dead Claim

a. It is submitted that the CENVAT Credit of Education Cess and Secondary and Higher Education Cess which had been availed prior to the cut of date namely 01.03.105 and 01.06.2015 had become dead claim and cannot be revived after a time gap of two years. The levy having been withdrawn in the year 2015, the availed credit could neither be utilised post 2015 nor can it be transitioned into Goods and Service Tax Act, 2017 regime(hereinafter referred as GST Enactment). In other words the enactment of the Central Goods and Service Tax Act, 2017 (hereinafter referred as CGST Act) with effect from 01.07.2017 cannot be treated as revival or extension of limitation when the claim itself becomes a dead claim. The appellant relies on the observations of the Hon'ble Supreme Court in the case of ***UOI v. Uttam Steels Ltd. (2015) 13 STC 209.***

LEGAL PROPOSITION II :- Cess is Not "Eligible Duties":

a. Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess may have the colour of duty or tax at first blushper se, but is not tax or excise duty per se. Contrary

to the levy of tax and duty which are compulsory exactions of money from the public for public purposes enforceable by law and is not payment for services rendered, the cess is levied with a ***quid pro quo element*** *for services rendered.*

b. The appellants/department places reliance on the Judgment of the Hon'ble Supreme Court in ***The Commissioner, Hindu Religious Endowments, Madras v. Sri LakshmindraThirthaSwamiar of Sri Shirur Mutt MANU/SC/0136/1954 : AIR 1954 SC 282Matthews v. Chicory Marketing Board (1938) 60 C.L.R. 263Dewan Chand Builders & Contractors v. UOI [2012 1 SCC 101],***

Tamil Nadu Minerals Limited Vs. The Joint Commissioner of Income Tax, Company Range-III [(2019)310C TR(Mad)746, [2019]414ITR196(Mad)].

c. It is submitted that as held by the Hon'ble Apex Court, if the Statement of Objects and Reasons spells out the essential purpose which the enactment seeks to achieve or if the AmendingAct introducing the levy of cess spells out the specific purpose in which the levy has been introduced, then the subject levy has to be construed only as a fee and not a tax.

d. Section 91 of the Finance Act, 2004 which introduced the levy of Education Cess specifically provides that the levy of Education Cess is provide funds for basic education. Similarly Section 136 of the Finance(Amending Act) 2007 specified the purpose viz to provide funds and infrastructure for medium and higher education.

e. It is submitted that the other requirement that the fund is set apart and appropriated specifically for the performance of specified purpose and is not merged with benefit of the general public is also there in the present case.

f. The contention of the respondentassessee by placing

reliance on the decision in ***Hingir Rampur Coal Company Ltd. v. State of Orissa MANU/SC/0037/1960 : 1961 (2) SCR 537*** *that the Education Cess, Secondary and Higher Education Cess were credited into the Consolidated Fund of India(herein after referred as CFI) and therefore it is collected only a tax is wholly untenable for the following reasons:-*

i. Although initially the collections of Education Cess, Secondary and Higher Education Cess were credited into the Consolidated Fund of India,a specific account called ***Prarambhik Shiksha Kosh (PSK)*** *was created in the year 2005-06 after obtaining Parliamentary authorization and these funds collected with respect to the education cess were transferred to* ***Prarambhik Shiksha Kosh (PSK)****.Thus even though initially the funds pertaining to Education Cess were credited into the Consolidated Fund of India, it has been later transferred to the* ***Prarambhik Shiksha Kosh (PSK)*** *specifically created for the purpose of expending the Education Cess funds. This fact has been admitted by the respondentassessee* ***[page 78 of additional paper book filed by the respondentassessee – report of CAG]****.*

ii. The respondentassessee herein submits that even though the Secondary and Higher Education Cess was introduced in the year 2007, the entire collection pertaining to Secondary and Higher Education Cess has been credited into the Consolidated Fund of India and no separate fund has been created. The respondentassessee relies on the CAG report for the year 2014-15 and 16-17.

In this connection the appellantdepartment submits as follows:-

· Even though the collection of SHECess was credited into the Consolidated Fund of India it was not expended or spent for general public purpose and was awaiting proper Parliamentary approval for creation of a separate fund.

· On 16.08.2017, the Union Cabinet accorded the approval for creation of the non-lapsable separate account called as ***Madhyamik &Uchhatar Shiksha Kosh (MUSK)*** *into which all the proceeds of the Secondary and Higher Education Cess would be credited.*

· In this connection the appellant herein files type set no 4 containing305th report of the ***Department-Related Parliamentary Standing Committee on Human Resource Development*** *and the press release by the* ***Press Information Bureau****dated 16.08.2017.*

· Para 2.8 of the standing committee report gives the details of this specific fund called ***Madhyamik &Uchhatar Shiksha Kosh (MUSK)****.*

· Sub para (a) of para 2.8 states that the proceeds of Secondary and Higher Education Cess will be credited into the ***Madhyamik &Uchhatar Shiksha Kosh (MUSK)****.*

· Further sub para (c) of para 2.8 categorically states that the cess would be utilised in the ongoing schemes of Secondary and Higher Education.

· Sub para (e) of para 2.8 specifies that the ***Madhyamik &Uchhatar Shiksha Kosh (MUSK)*** *would be maintained as a reserve fund in the non interest bearing section of the Public Accounts of India.*

· Para 2.9 mentions the actual fund allocations to be provided under the ***Madhyamik &Uchhatar Shiksha Kosh (MUSK)****.*

· Similarly para 2.10 of the Standing Committee report gives elaborate details about the ***Prarambhik Shiksha Kosh (PSK)*** *that was credited in the year 2006.*

· It also states very specifically that the ***Prarambhik Shiksha Kosh (PSK)*** *fund is maintained by the Ministry of Human Resource Development and that the transfer to the*

Prarambhik Shiksha Kosh (PSK) *account are made by the Ministry of Finance after approval by the Parliament.*

· Para 2.11 has also given the year wise chart on allocation and utilisation of education cess collected.

It is further submitted that this point could not be brought to the notice of this Hon'ble Court during the oral arguments as the respondentassessee herein filed the additional type set 2 containing the CAG report on the final day of the arguments. Thus the appellants herein submits and crave leave before this Hon'ble Court to make this submission on ***Madhyamik &Uchhatar Shiksha Kosh (MUSK)*** *and the Standing Committee report as a response to the additional type set 2 and response to submissions of the respondent herein regarding the Consolidated Fund of India.*

LEGAL PROPOSITION III :-Cesses cannot take colour of basic levy

a. It is submitted that the term duty does not include additional duties such as Education cess, Secondary and Higher Education Cess NCCD etc. thus unless there is specific notification or provision which specifically provides for any benefit with regard to additional duty, the benefit that is applicable to basic duty or tax cannot be extended to the additional duty. In this connection the appellant places reliance on the decision of the larger bench of the ***Hon'ble Apex Court in UOI v Modi Rubber (1986 25 ELT 849 SC)****.*

b. Following this decision the latest decision of the Larger Bench of the Hon'ble Supreme Court in ***Unicorn Industries V UOI(2019 370 ELT 3)*** *as held that education cess, secondary and higher Education cess, NCCD etc which are all additional levy are independent in nature and do not take the colour of basic levy. The larger bench of the Hon'ble Supreme Court has held in two Division Bench judgments of the Hon'ble Supreme Court in* ***SRD Nutrients Private Limited v. Commissioner of Central Excise, Guwahati,***

MANU/SC/1407/2017 : (2018) 1 SCC 105 and the decision of this Court in Bajaj Auto Limited v. Union of India and Ors., MANU/SC/0417/2019, decided on 27.3.2019 *as per incuriam as the two Division Bench judgments had not followed the law laid down by the larger bench of the Hon'ble Supreme Court in* ***UOI v. Modi Rubber****.*

c. It is submitted that although the decisions of the Larger Bench of the Hon'ble Supreme Court arose in the context of exemption to the basic central excise, customs duty and whether the benefit of the exemption could be extended to the benefit of Education Cess, Secondary and Higher Education Cess, NCCD etc. , the law laid down by the Hon'ble Supreme Court can be extended to the present case of transition of CENVAT Credit of the eligible duties. Thus the appellant submits, that the term "eligible duty" occurring in Section 140(1) of the CGST Act, 2017 cannot include the CENVAT Credit pertaining to Education Cess, Secondary and Higher Education Cess and Krishi KalyanCess as these are additional levy and had not been specifically provided in the Section.

d. It is submitted therefore that the argument of the respondent herein that the extension of the applicability of Explanation 1 to Section 140(1) has not been brought into effect and hence the term "eligible duties" should be allowed to include cesses, is wholly untenable.

e. Explanation (3) to Section 140 also makes it categorical that the intention of the Legislature was never to transitioned the CENVAT Credit pertaining to cesses.

LEGAL PROPOSITION IV :- Cesses Cannot be Cross Utilised as against duties or taxes:

a. The respondentassessee herein has placed reliance on the decision of the Hon'ble Supreme Court in ***Eicher Motors Ltd. v. UOI [1999 (106) ELT 3 (SC)****. The contention of the respondentassessee herein is that the CENVATCredit pertaining to Education Cess, Secondary and Higher*

Education Cess had already been availed as on 01.03.2015 and 01.06.2015 respectively but could not be utilised as cross utilisation with respect to excise duty and service tax was not permitted. Thus, their contention is that even though the CENVATCredit of Education Cess, Secondary and Higher Education Cess availed and available in the books of accounts and were lying unutilised due to the barring provisions, they could be transitioned into the GST regime as it was an indefeasible right.

b. It is submitted that the there is difference between the availment of credit and utilisation of credit. The appellant also admits the legal position propounded by the respondent that even though there is statutory time limit fixed for availment of credit there is no time limit for utilisation of credit. However, the utilisation of the availed credit will remain indefeasible only when the facility for working it out or the levy with regard to the output element remains intact. In ***Eicher Motors Ltd. v. UOI [1999 (106) ELT 3 (SC)*** *a provision which provided the lapse of MODVAT Credit was challenged. However in the facts before the Hon'ble Supreme Court, the levy or the output element was still intact and in such circumstances the Hon'ble Supreme Court observed in para 6 of the Judgment, that the right accrued to the assessee on the date they paid the tax on the raw material or the inputs would continue until the facility available thereto gets worked out or until those goods existed. Thus the Hon'ble Supreme Court presupposed the existence of the facility for working out the earned credit and the existence of the output element for the duty for utilisation of the credit. In the present case however, the levy of the Education Cess, Secondary and Higher Education Cess had been taken away in the year 2015 itself. In other words, the facility for working out the earned credit has been taken away and hence the possibility of continuing the right has also ceased. The Hon'ble Delhi High Court in the case of* ***Cellular Operators Association of India v UOI[Reported in 2018 (14) GSTL 522, (2018) 51 GSTR***

338 (Del), MANU/DE/0710/2018] *has distinguished the Hon'ble Supreme Court* ***Eicher Motors Ltd. v. UOI [1999 (106) ELT 3 (SC)*** *of the Hon'ble Supreme Court.*

LEGAL PROPOSITION V:- Doctrine of Purposive interpretation:

a. Section 140 which deals with transition of CENVATCredit of eligible duties and taxes envisages 9 different situations of which the situation postulated in sub section (1) and sub section (8) are almost similar in effect. The specific similarity in the two subsectionsare that in both the subsections the provisions speak about regular tax payers who have been in the CENVAT chain all along and who have excess credit in the last return of the erstwhile law preceding the date of inception of GST viz 01.07.2017. The difference between the two subsectionsis that while subsection (1) takes in its hold, manufacturers and service providers with single registration,subsection (8) deals with the centralised registration that was one of the norms in the service tax registration. First provision to subsection(8) of Section 140 further provides a leverage of 3 months to such assessee to transitioned the credit even postinception of GST. The other subsection deals with other specified circumstances, exempt goods or services in the earlier regime.

b. However, the commonality in all the subsections except subsection (8) the phrase used is either "CENVAT Credit of the eligible duties" or "CENVAT Credit of eligible duties and taxes".The term "of eligible duties" or "of eligible duties and taxes" is not there in subsection (8) of section 140 of the CGST Act, 2017. Thus, the contention of the respondent is that they fall under section 140(8) as they were having centralised registration in the earlier regime and that as the subsection does not contained the phrase "of eligible duties" or "of eligible duties and taxes". The CENVAT credit pertaining to Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess can be transitioned

into the GST regime.

This contention is refuted by the appellant .

c. Regarding the contention that section 140(8) does not contain the phrase "of eligible duties" or "of eligible duties and taxes". The appellants submits that a harmonious construction of section 140 of the CGST Act, 2017 as a whole indicates that the draftsman intended the transition of only the eligible duties and taxes of the earlier regime that has been subsumed prior to the inception of GST.

d. Thus as on 01.07.2017 Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess had been abolished vide Taxation Law Amendment Act, 2017 04.05.2017, along with other levies. Hence the above three cesses were not subsumed along with the 14 taxes and duties on the date of inception of the GSTEnactment and hence transition of the same is not possible.Thus, the intention of the draftsman is discernible that the CENVATCredit of the cesses was never intended to be transitioned.

e. The respondent contention that the absence of the words "of eligible duties"in Section 140(8) would mean that even CENVAT Credit pertaining to cessescould be transitioned, is wholly untenable. It is submitted that as all the other subsection using the phrase "CENVATCredit "of eligible duties" or CENVAT credit "of eligible duties and taxes",the absence of the phrase "eligible duties" in subsection 8 is nothing but an unintentional oversight by the draftsman and not intentional.

f. On a harmonious construction of entire section 140 which deals withtransitioning of only the subsumed duties and taxes,a literal interpretation by the respondent to make subsection (8) as a standalone provisionwill only lead to absurdity.

g. To support this contention, the appellants herein relies on the decision of the Hon'ble Supreme Court in ***Dilip S. Dhanukar Vs. Kotak Mahindra Co. Ltd. and Ors.[MANU/SC/8289/2007]*** *wherein the Doctrine of Purposive Interpretation has been explained with reference to Bennion's Statutory Interpretation. According to Bennion's Statutory Interpretation relied by the Hon'ble Supreme Court,three condition are necessary to employ the doctrine of purposive interpretation in place of literal interpretation :-*

1. Whether the reading of the whole statuteor provision would determine precisely what the mischief was, the purpose of the act of was to remedy.

2. That the draftsman and Parliament had by inadvertent overlooked and omitted to deal with the eventuality that required to be dealt with, if the purpose of the Act is to be achieved.

3. It was possible to state with certainty what would be the additional word that would have been inserted by the draftsman and approved by the Parliament before the bill passed into law.

h. Applying the doctrine of purposive interpretation to subsection(8) of section 140, the appellant submits that the three-condition laid down above are satisfied.

1. The purpose of section 140 was to transition only the subsumed duty and taxes which were in existence as on 01.07.2017 and it was never the intention to transition the cesses which have been abolished much prior to 01.07.2017.

2. The draftsmen by inadvertencehad overlooked the phrase "of eligible duties" and the omission is not intentional.

3. It can be said with certainty that the additional words which would have been inserted by the draftsman had the attention been drawn much earlier would be "of eligible duties".

LEGAL PROPOSITION VI :- Implied Lapse

a. Thus the last legal proposition submitted by the appellant herein that Section 140(1) and Section 140(8) signifies an implied lapse of the availed CENVAT Credit of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess which were availed and lying unutilised in earlier regime and thus cannot be transitioned into the GST Regime.

Thus, in the circumstances stated above and those urged in the Grounds of Appeal and oral arguments, it is prayed that this Hon'ble Court may be pleased to ALLOW the Writ Appeal 53/2020 , pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice."

Contentions raised on behalf of Respondent/Assessee

21. On the other hand, the learned counsel for the respondent Assessee, Mr.Raghavan Ramabadran, supported the order of the learned Single Judge and urged that as per CENVAT Rules, 2004, the Assessee had already taken or availed the credit of the Education Cess and Secondary and Higher Education Cess paid by him on the inputs and therefore, the right to utilise the same against the Output Tax Liability was a vested and indefeasible right of the Assessee and could not be taken away by the Legislature when a switch over was made to GST Regime with effect from 01.07.2017.

22. Elaborating his arguments, he submitted that the present Assessee provides Countrywide Technical Services and Call Centre facilities to its customers, on a centralised registration under the provisions of CGST Act and therefore, in terms of Section 140(8) of the CGST Act, it was entitled to avail credit of the amount of CENVAT credit as defined in CENVAT Rules, 2004 against its Output Tax Liability even under the GST Regime. He submitted that the amendment to Section 140(1) by CGST (Amendment) Act, 2018 with retrospective effect from 01.07.2017 by insertion of words "of eligible duties" in Section 140(1) of the Act and the words "eligible duties and tax" did not affect Section 140(8) of the Act, as no such similar insertions were made in Section 140(8) of the Act and the said Sub-section (8) of Section 140 independently covers the case of the present Assessee which entitled him to take such credit of the Education Cess and Secondary and Higher Education Cess, even after the introduction of GST Regime with effect from 01.07.2017. He submitted that such Cess was collected in the form of duty and taxes only and therefore, even though they were imposed by the Finance Act, the collection of levy was in the nature of duty or tax and the same was liable to be set off and utilised against the Output Tax

Liability.

23. Though the learned counsel for the Assessee admitted that cross utilisation of Cess against the Output Tax Liability of Excise Duty and Service Tax prior to introduction of GST Regime on 01.07.2017 was not permitted as per Rule 7 of the CENVAT Rules, 2004 and Cess could be set off only against the Output Levy of Cess while the said imposition was operating, but, nonetheless, the CENVAT Credit in respect of such Cess, which was not so far utilised and such credit was carried forward in its Electronic Ledger which was submitted in the form of TRAN-1 Form as required in the new GST provisions was never objected to by the Revenue authorities until the impugned communication was issued to the Assessee on **14.02.2018** which led to the filing of the writ petition. Therefore, the learned Single Judge was justified in allowing the same to the Assessee.

24. The learned counsel for the Assessee also submitted that Explanation 1 and 2 of Section 140 of the CGST Act clearly stipulated and while Explanation 1 talks of the expressions "**Eligible Duties**" in Sub-sections (1), (3), (4) and (6) of Section 140, Explanation 2 talks

of expressions "**Eligible Duties and Tax**" in Sub-sections (1) and (5), under the specified enactments mentioned in Explanations 1 and 2 and since the Education Cess and Secondary and Higher Education Cess were not mentioned in those Explanations 1 and 2, therefore, the Cess did not fall within the ambit and scope of "Eligible Duties" or "Eligible Duties and Taxes" and the claim of the Assessee with respect to the set off could not be denied on the anvil of the said expressions. He also submitted that the CGST (Amendment) Act, 2018 insofar as it amended Explanations 1 and 2 to Section 140 were not yet enforced and would be so enforced from a date which was yet to be notified and therefore, the Assessee's claim under Section 140(8) of the Act could not be defeated taking help of Explanation 3 as well. Explanation 3 was inserted in Section 140 also by CGST (Amendment) Act, 2018, with retrospective effect from 01.07.2017 when GST Regime was made operational.

25. The learned counsel for the respondent Assessee also relied upon the case laws which will be discussed hereafter.

26. The learned counsel for the Assessee also filed his written

submissions and the same is taken on record and it is extracted as under, which we have considered.

WRITTEN SUBMISSIONS ON BEHALF OF THE 1st RESPONDENT (ASSESSEE)

Issue involved:

Can CENVAT credit of Education Cess ('Edu Cess'), Secondary & Higher Education Cess ('SHE Cess') and Krishi Kalyan Cess ('KKC') (collectively referred to as 'Cesses') which are validly availed and lying unutilized as per the last return filed for the period ending 30th June 2017, be transitioned into the GST regime?

Respondent Assessee's submissions:

A. Unutilised CENVAT credit can be transitioned under Section 140(8) of CGST Act.

A.1 The assessee had a Centralized registration under the Finance Act, 1994 and the impugned Cess credits were being carried forward in the periodic Returns and declared as unutilized credit in their Return (in Form ST-3 for service tax assessees) filed for the period ending June 2017. This is an undisputed fact.

A.2 The factum of valid availment (act of taking credit – does not denote utilization or adjustment) of the impugned Cess credit is undisputed.

A.3 Hence, the eligibility to the impugned Cess credit till 30th June 2017 cannot be disputed. (Refer para A.11 below)

A.4 The credit which is validly availed under the erstwhile laws (here, Cenvat Credit Rules, 2004) and lying unutilized as on 30 June 2017 can be transitioned into the GST regime only through Section 140 of the CGST Act. In other words,

Section 140 of the CGST Act is the only provision which provides for the mechanism of transitioning credits eligible under the erstwhile laws into the GST regime.

Each sub-Section of 140 deals with a specific scenario

A.5 The said provision consists of several sub-sections, each of which is in relation to a specific independent scenario of transition. The following table would illustrate the purpose of each sub-Section of Section 140.

Sub-Section	***Purpose***
140(1)	*Transition of already availed cenvat credit reflected in the last Returns filed under the erstwhile laws. It is based on credit availed and remaining unutilized in the Returns.*
140(2)	*It covers transition of unavailed credit on capital goods under the erstwhile laws. CCR restricts credit on capital goods for the first year to be 50%. The remaining portion of credit unavailed, which is not covered under the Returns filed under erstwhile laws, is granted. It is not covered under Section 140(1).*
140(3)	*It covers registered person who was enjoying exemption from output liability under erstwhile laws but is subject to GST liability. It grants credit in respect of inputs lying in stock as on 01.07.2017. It is not covered under Section 140(1).*
140(4)	*It covers registered person who was engaged in both taxable and exempted activities under erstwhile laws but is now wholly subject to GST liability. It grants credit as reflected in the last Returns filed and also credit in respect of inputs lying in stock as on 01.07.2017. It is not covered under Section*

	140(1).
140(5)	*It covers a situation of goods in-transit, invoices in transit and the like where the duty/tax has been paid under the erstwhile laws and the actual receipt of inputs/ input services is after introduction of GST. It grants credit in respect of those duty/tax paid documents within a period of 30 days from receipt. It is not covered under Section 140(1).*
140(6)	*It covers a situation wherein the registered person was paying duty based on capacity of manufacture, taxes under composition scheme and the like but has chosen to discharge GST liability at normal rates. It grants credit in respect of inputs lying in stock as on 01.07.2017. It is not covered under Section 140(1).*
140(7)	*It provides for distribution of credit availed by Input Service Distributor in respect of services received prior to GST. It is not covered under Section 140(1).*
140(8)	*It provides for transition of CENVAT credit in respect of centralized registered person under the Finance Act, 1994. It is not covered under Section 140(1) according to the assessee.*
140(9)	*It provides for taking recredit of CENVAT credit on input services in a situation where it is reversed for non-payment of consideration within three months. It is not covered under Section 140(1).*

A.6 It is submitted that there is no overlap in the situations contemplated in each sub-Section of Section 140. ***Thus, each***

sub-Section is independent, stand alone and self-contained dealing with separate scenarios, enabling seamless transition of credit.

A.7 While Section 140(1) governs a situation of transition of credits lying unutilized in the last return filed under erstwhile laws, a very similar phraseology is also available in Section 140(8). The only difference between Section 140(1) and Section 140(8) is that sub-Section (8) deals specifically to a case of dealers having centralized registration while sub-Section (1) does not have such qualification. If both the provisions are to be construed harmoniously so that no provision is rendered otiose, then Section 140(1) should be read as covering all scenarios other than the case of dealers having centralized registration. Thus, both the provisions can co-exist, have its full play and no part of any provision be rendered redundant. Reliance in this regard is placed on ***CCE v. Universal Ferro and Allied Chemicals Ltd. 2020 5 SCC 332*** *[paragraph 46 to 48]*

A.8 Since the assessee was having a centralized registration, the assessee's case would be squarely covered by Section 140(8) being a specific provision as compared to Section 140(1).

A.9 Section 140(8) of the CGST Act states that a registered person having centralized registration under the existing Law (Finance Act, 1994) and has obtained a registration under the CGST Act, shall be allowed to take (avail), in his electronic credit ledger, credit of the amount of CENVAT Credit carried forward in the returns, furnished under the existing law (ST-3 Returns) in respect of the period ending with the day immediately preceding the appointed day (April-June 2017) in such manner as may be prescribed. First Proviso states that if the last period's Returns under existing law is filed within three months of the appointed day, the credit as reflected in the original/revised Return shall be

allowed. The assessee filed the ST-3 Returns for April-June 2017 using this extended time period provided. Second Proviso states that the credit shall not be allowed unless it is eligible as an Input Tax Credit under GST. It is an admitted position that second Proviso is not attracted in the present case. Further, third Proviso to Section 140(8) of the CGST Act states that such credit may be transferred to any of the registered persons having the same PAN for which centralized registration was obtained under the existing law.

A.10 Explanation to Section 143 of the CGST Act states that the term 'CENVAT credit' shall have the same meaning as assigned to it under Central Excise Act, 1944 ('Excise Act') or the rules made thereunder for the purpose of the Chapter on transitional provisions.

A.11 Cenvat Credit Rules, 2004 ('CCR', in short) was framed under the powers conferred by Section 37 of the Central Excise Act, 1944 ('Excise Act'). Rule 3(1) of CCR is the provision allowing persons to take (avail) CENVAT credit. It enumerates the various duties and taxes that can be taken as CENVAT credit. Education Cess and Secondary and Higher Education Cess are enumerated under clause (vi) and (via) respectively. Further, as per Rule 3(1a) of CCR, Krishi Kalyan Cess can also be taken as CENVAT credit. Hence, all the three Cesses qualify to be 'CENVAT credit' as per Rule 3(1) of CCR.

A.12 Thus on a plain construction of Section 140(8), credit of Cesses is eligible to be transitioned. The submission of the Appellant Department that the words 'eligible duties' should be read into Section 140(8) would amount to causing violence to the provision and hence impermissible.

A.13 When the Legislature introduced the words 'eligible duties' by way of a retrospective amendment in Section 140(1) vide Central Goods and Services Tax (Amendment)

Act, 2018 ('Amendment Act'), it has deliberately chosen not to amend sub-Section (8). Hence, a purpose and intent behind the non-amendment should be imputed and thereby the wisdom of the Legislature should be respected. Therefore, the said expression 'eligible duties' ought not to be read into the provision. Reliance is placed on decision of ***P.M. AshwathanarayanaSetty v. State of Karnataka, 1989 Supp. (1) SCC 696*** *[Paragraph 30] to state that legislative wisdom ought not to be questioned. It cannot be merely ignored as an oversight by the Legislature as was submitted by the Appellant Department.*

A.14 Further, it is a settled position that Courts do not read words and expressions not found in the provision/statute as it would amount to venturing into a kind of judicial legislation. Reliance in this regard is placed on ***Union of India v. Ind-Swift Laboratories Ltd. 2011 (265) ELT 3 (S.C.)*** *and* ***CIT v. Calcutta Knitwears (2014) 6 SCC 444*** *(paragraphs 29 to 31). Such an exercise would amount to a situation of casus omissus which is impermissible for the Courts to do. Therefore, these words cannot be supplied into the provisions. Reliance in this regard is placed on* ***UOI Vs. Deoki Nandan Aggarwal 1992 AIR 96 SC*** *[paragraph 14],* ***B.R. Kapur v. State of T.N. &Anr. (2001) 7 SCC 231****[paragraph 39] and* ***UOI v. Dharmendra Textile Processors 2008 13 SCC 369*** *[paragraph 16].*

A.15 The Appellant Department has placed reliance on Dilip S Dhanukar v. Kotak Mahindra Ltd. & Ors. [MANU/SC/8289/2007] for adopting purposive interpretation. The said decision was rendered in the context of personal liberties of an accused while interpreting criminal law provisions and Article 21. The same principle cannot be applied for interpreting taxing statutes wherein, as stated above, it has been held time and again that literal interpretation ought to be adopted. Further reliance is also placed on ***CST v. Modi Sugar Mills Ltd. AIR 1961 SC 1047***

*and **Ind-Swift Laboratories Ltd. case (supra)**, which was held in the context of CENVAT Credit itself.*

*A.16 Further, it is submitted that the assessee has all along maintained its claim under Section 140(8) and never had forsaken it. It is not the case of the Appellant/Department that the assessee does not fall under Section 140(8). In any case, even assuming without conceding that the said claim was forsaken, reliance is placed upon Hon'ble Supreme Court decision in **Share Medical Care v. UOI 2007 (209) ELT 321 (SC)** to advance the argument that there is no estoppel in claiming the benefit at a later stage. It was held therein that even if an applicant does not claim benefit at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage.*

B. Alternatively, transitional credit is valid under Section 140(1).

B.1 Section 140(1) of the CGST Act states that a person registered both under the existing law and GST, shall be allowed to take, in his electronic credit ledger, credit of the amount of 'CENVAT Credit of eligible duties' carried forward in the returns, furnished under the existing law by him (ST-3 Returns) in respect of the period ending with the day immediately preceding the appointed day (April-June 2017) in such manner as may be prescribed. It is an admitted position that the provisos to Section 140(1) are not attracted in the present case.

B.2 The submissions in paragraph A10 & A11 above on the meaning of CENVAT credit and how the Cesses are covered under the same in the context of Section 140(8) is applicable to Section 140(1) as well.

B.3 The assessee submits that the true meaning of the term 'eligible duties' in Section 140(1) needs to be then examined.

B.4 The term 'eligible duties' is defined in Explanation 1 to

Section 140 as being applicable to transition of credit under Section 140(6). It is for this reason that it states that the same would mean the duties enumerated therein, paid on inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day. Though the Amendment Act proposed to extend it to Sub-sections 1,3 & 4 of Section 140(1) as well, the same is not in force as the Central Government has deliberately chosen not to notify it. Thus, meaning of 'eligible duties' in Explanation 1 to Section 140 cannot be extended to Section 140(1). It is reiterated that it is not a mere inadvertent error but a deliberate decision. Hence, the purpose of not notifying should be looked into. Therefore, the said expression 'eligible duties' in Section 140(1) ought not to be read as defined under Explanation 1 to Section 140, which is for a wholly different purpose and situation.

B.5 Since Explanation 1 of Section 140 cannot be attracted and Explanation 2 is not applicable, eligible duties in 140(1) is to be understood in its normative sense. In the context of CENVAT credit, it is submitted that it ought to be understood as duties which are eligible for availmentas CENVAT credit.

Impugned Cesses are duties of excise though not Basic Excise Duty.

B.6 It is submitted that the impugned Cesses are duties of excise/ taxes. These Cesses are imposed on the event of manufacture/ provision of service and therefore, it would partake the character of duties of excise or tax on service, as the case may be.

B.7 Edu Cess and SHE Cess were levied on manufactured goods based on the powers conferred under Entry 84 of Union List, Seventh Schedule to the Constitution. The same, prior to 101st Constitutional Amendment Act, reads as follows:

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

B.8 Hon'ble Supreme Court in the case of ***Governor General-in Council v. Province of Madras 1954 SCR 1046*** *[paragraph 23 in Hingir-Rampur decision at page 98 in Assessee Respondent's paperbook dated 30th September 2020] has held that a duty of excise is primarily a duty levied on manufacturer or producer in respect of the commodity manufactured or produced. It is on account of this reason that the charging Section of Edu Cess and SHE Cess on excisable goods under Finance Act 2004 and Finance Act, 2007 levy it as duties of excise.*

The Impugned Cesses are levied as tax and not as fee.

B.9 It is further submitted that all the impugned Cesses are levied as duties and taxes and not as a fee. While the assessee elaborates the same infra, it is not the case of the assessee that these Cesses are basic excise duty levied under Central Excise Act. In other words, this is a cess levied as a duty and it is in the character of duties of excise but it is not excise duty per se.

B.10 Further, Edu Cess and SHE Cess on taxable services and KKC are also covered under the term 'eligible duties' in Section 140(1) as the term duties encompasses taxes within its ambit as well. Article 366(28) of the Constitution defines 'taxation' to include includes the imposition of any tax or impost, whether general or local or special and that the term 'tax' shall be construed accordingly. Department's Circular in No. 87/06/2019-GST dated 02.01.2019 states that the term duties and taxes are used interchangeably [paragraph 3.1.(iii) at page 30 of the paperbook dated 23rd January

2020]. Hence, Edu Cess and SHE Cess on taxable services and KKC, being in the nature of taxes, are also covered under the term 'eligible duties' in Section 140(1).

B.11 Much reliance has been placed by the Appellant Department on UOI v. Modi Rubber Ltd. 1986 (25) ELT 849 (SC) and Unicorn Industries v. UOI 2019 (370) E.L.T. 3 (S.C.). At the outset it is submitted that the same are not relevant for the issue in hand. In Modi Rubber Ltd. case, the issue involved was whether exemption Notification issued under Rule 8(1) of Central Excise Rules can be borrowed for claiming exemption from special duties of excise levied under Finance Act, 1979. The Court held that the power to grant exemption under Rule 8(1) is only in respect of basic excise duty under the Excise Act. Therefore, any Notification issued under the said Rule cannot be read as extending the benefit to levies created under a different Enactment like Finance Acts. In other words, this decision is not an authority on the point whether special excise duties are duties of excise or not. Similarly, in the ***Unicorn Industries case****, the issue was whether an exemption Notification issued under Section 5A of the Excise Act can be automatically applied for claiming exemption from Cesses levied under various Finance Acts. It is submitted that none of these are authorities to decide whether cesses are duties of excise.* ***The only conclusion that can be drawn from these cases at best is that Cesses levied under Finance Acts are not Basic Excise Duty. The assessee also admits to this legal position*** *and therefore, reference to these decisions do not advance the case of either side in this Writ Appeal.*

<u>Explanation 2 and 3 to Section 140 are not attracted.</u>

B.12 It is submitted that Explanation 2 to Section 140 defines the expression 'eligible duties and taxes'. The said definition is irrelevant for both Section 140(1) and 140(8) as the same is not employed therein. Further, the amendment sought to be made under the Amendment Act to extend the application of the definition to Section 140(1), has not been notified in

respect of this Explanation 2 as well.

B.13 Further, ***Explanation 3 to Section 140 clarifies that the expression 'eligible duties and taxes' does not include any Cess*** *not mentioned in Explanation 1 and Explanation 2.* ***This Explanation 3 insertion to Section 140 of CGST Act has been notified.*** *However, as stated earlier, since the expression 'eligible duties and taxes' is not employed either in Section 140(1) and Section 140(8) and Explanation 3 being only in the nature of explaining the scope of the said expression, the said* ***Explanation 3 becomes irrelevant*** *in understanding the scope and coverage of Section 140(1) and Section 140(8). Hence, the same is not applicable to the present case even though it has been notified.*

C. Cesses are in the nature of duty and not fee.

C.1 In the case of ***Hingir-Rampur Coal Ltd. v. State of Orissa AIR 1961 SC 459****, Constitution Bench of Hon'ble Supreme Court affirmed the basic tests, laid down in previous cases, for determining the character of a cess levy – whether it is in the nature of a tax or fee. It held that a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, whereas a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. It further held that tax recovered by public authority invariably goes into the Consolidated Fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the Consolidated Fund. It is earmarked and set apart for the purpose of services for which it is levied.*

C.2 Reliance in this regard is also placed on the following cases.

Case law	***Reference paragraph numbers***
Shinde Brothers v. Deputy Commissioner AIR 1967 SC 1512	*26 to 31, 66 & 67*
Tamilnadu Minerals v. Joint Commissioner (2019) 414 ITR 196 (Mad)	*21 to 27*
Shri Krishna Rubber Works v. UOI 1970 SCC Online Bom 90	*30 to 42*

C.3 Further, Hon'ble Karnataka High Court in the case of ***CCE v. Shree Renuka Sugars Ltd. 2014 (302) ELT 33 (Kar)****, while holding that Sugar Cess is in the nature of a tax/duty, held that if the cess levied and collected is credited to the Consolidated Fund of India and it has to be appropriated by the Parliament by law and then only the said amount could be credited to the Fund; it ceases to be a fee and partakes the character of a duty or a tax.*

C.4 A conjoint reading of the all the above judgements would clearly indicate that when an impost (by whatever name called) goes to the Consolidated Fund of India and not to any specific fund earmarked for the purpose, then such impost would acquire the character of taxes and not fee.

Impugned Cesses collected form part of Consolidated Fund of India

C.5 Supplementing this submission, reference is next made to the treatment of the impugned Cesses collected by the Central Government with the aid of provisions in the Constitution and Comptroller & Auditor General of India ('CAG') Reports.

C.6 As per Article 266(1) of the Constitution, all revenues collected by the Central Government shall form part of the Consolidated Fund of India. As per Article 266(2), all public

monies collected shall be credited to Public Account of India. As per Article 266(3), no money collected in Consolidated Fund of India can be appropriated except with the authority of law and for the purposes and in the manner mentioned in the Constitution. Therefore, all taxes are credited into Consolidated Fund of India and used through an appropriation law passed. Whereas, any Cess collected as fee is collected in a specific public account for the purposes mentioned and does not go into the Consolidated Fund of India. Further, as per Article 114(3) of the Constitution, no money can be withdrawn from the Consolidated Fund of India without an appropriation made under law in accordance with Article 114.

C.7 The CAG Reports relied upon by the assessee clearly establish that the Cesses are collected into the Consolidated Fund of India and not credited into any specific fund set up for this purpose. [pages 78, 78A, 81 – para 2.3.3, 84, 89 of paperbook dated 30th September 2020]. In fact no Fund has ever been created for the purpose and a portion of the collections has been only transferred to a Major head of account as part of Reserve Funds in Public Accounts. The money has not been spent either for the stated purposes.

C.8 In the CAG Report for FY 2014-15, it has been stated that A non-lapsable fund for elementary education known as Prarambhik Shiksha Kosh (PSK) was created in 2005-06 under non-interest bearing section of the reserve funds in the Public Account. Further, it states that Edu Cess is initially credited into Consolidated Fund of India and that there is no correlation between the collection of Edu Cess and amount transferred into such PSK fund created. In respect of SHE Cess it states that there is neither a fund was designated to deposit the proceeds of SHEC thereto nor schemes identified on which the cess proceeds were to be spent.

C.9 CAG Report for FY 2016-17 states that SHE Cess

collected by Central Government is credited into Consolidated Fund of India without creation of even a reserve fund in the Public Account. It also shows short-transfer into the specified funds under the Public Account in respect of Edu Cess and KKC.

C.10 CAG Report for FY 2017-18 states that SHE Cess is retained in the Consolidated Fund of India, even though Madhyamik and Uchchtar Shiksha Kosh (albeit created contrary to procedure) Fund was created in August 2017. It further states that this Fund has not been made operationalized so far.

C.11 The above CAG Reports evidence that the Impugned Cesses are retained in the Consolidated Fund of India or are merely accounted under a distinct treasury account name in the Public Account.Thus, it is submitted the Cesses having been deposited into Consolidated Fund of India and there being no quid pro quo between collection and expenditure of these Cesses, they are in the nature of tax and not fee.

*C.12 It is submitted that it is for these reasons, even Hon'ble Delhi High Court in the **Cellular Operators Association of India v. UOI (2018) 14 GSTL 522 (Del.)** at paragraph 12, held that Edu Cess and SHE Cess are in the nature of taxes and not fees, even though it is not an excise duty or service tax per se. It has also been the consistent stand of the Assessee Respondent that the impugned cesses are not Excise Duties per se but only duty of excise.*

Nomenclature is not relevant for determining nature of levy.

*C.13 Reliance is also made on **Vijayalakshmi Rice Mill &Ors. V. CTO (2006) 6 SCC763** wherein it has been held that nomenclature is not relevant for determining whether a Cess is a tax or a fee [paragraphs 14 & 15 at page 195 of paperbook dated 30th September 2020]. As an illustration,*

reference can be made to Goods and Services Tax (Compensation to States) Act, 2017. Even though it is termed and collected as Cess, the preamble to the said Act has no semblance of a Cess levy. The said Preamble reads as, 'to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax..'. Thus, it is levied purely as a revenue generation measure, though nomenclatured as a Cess.

C.14 In light of the above, EC, SHE Cess and KKC are in the nature of tax/duty only and not in the nature of fee.

D. CENVAT Credit validly availed is a vested and indefeasible right.

D.1 It is submitted that the Impugned cesses were imposed under various Finance Acts and their levy were subsequently abolished. It is an undisputed fact that CENVAT Credit of these Cesses are availed through the provisions of CCR. CCR has been enacted using the powers conferred under Section 37 of the Excise Act. It is further submitted that Section 38A(c) of the Excise Act specifically saves any right accrued under any Rule amended, repealed, superseded or rescinded. Hence, while the levy was abolished, the CENVAT Credit availed under Rule 3 of CCR is specifically saved under Section 38A of the Excise Act.

D.2 Assessee submits that CENVAT Credit of Cesses validly availed by the assessee is a vested and indefeasible right and cannot be taken away without the authority of law. Reliance in this regard is placed on ***Eicher Motors Ltd. v. UOI 1999 (106) ELT 3 (SC)*** *and* ***CCE v. Dai IchiKarkaria Ltd. 1999 (112) ELT 353 (SC)****.*

D.3 Further reliance is placed on the following cases wherein it has been held that credit validly availed is a vested right under money credit scheme and the assessee was allowed to be utilize such credit even after abolishing of the Notification

providing for utilization of such credit.

a. Rasoi Ltd. v. UOI (2004) 176 ELT 101 (Cal) at paragraph 11-13.

b. Madhusudhan Industriesv. UOI (2014) 309 ELT 54 (Guj.) at para 12-14.

There is no concept of implied lapsing. Credit once validly availed cannot be taken away without express authority of law.

D.4 It is submitted that no provision is enacted to lapse the said CENVAT credit pertaining to the Impugned Cesses. Section 37(xxviii) of the Excise Act specifically confers powers on the Central Government to frame Rules for lapsing credits lying unutilized. Thus, lapsing of credits can happen only through framing of Rules for the purpose. It can never be through a mere implication.

D.5 It is submitted that had the intention of the Central Government been to lapse such CENVAT credit, it ought to have enacted lapsing provisions on the lines of Rule 11(2), 11(3), 11(4) of CCR etc. Even under the prior excise credit regime, whenever it was the intention of the Central Government to take away the existing un-utilized credits, the same was done by a specific lapsing provision such as Rule 57F (4A) of the Central Excise Rules, 1944. This was worked out based on the Hon'ble Supreme Court decision in Eicher Motors (supra) (judgment dated 28.01.1999), wherein Section 37 of the Excise Act was amended to bring in Section 37(xxviii) which conferred power on the Government to notify lapsing of credit. This was amended with retrospective effect from 16.03.1995 (through Finance Act, 1999) to take care of the lacunae pointed out in the Eicher Motors case. Unlike the above, the Government has not exercised its powers under Section 37(xxviii) of the Excise Act to lapse the CENVAT credit of EC, SHE Cess and KKC lying unutilized. In absence of the same, there cannot be any implied lapse.

D.6 Hence, the argument of the Appellant Department that

the lapsing of CENVAT Credit of Cesses has worked out itself without any exercise of power under Section 37(xxviii) of Excise Act is not in line with the Eicher Motors case.

D.7 It is an admitted position that no Rule has been framed by the Central Government under Section 37(xxviii) of the Excise Act for lapsing of unutilized CENVAT Credit of Impugned Cesses.

D.8 In light of the above, it is submitted that CENVAT Credit of Impugned Cesses lying unutilized as on 30.06.2017 cannot be denied as already lapsed.

E. The concept of 'availment' and 'utilization' of CENVAT credit are distinct and cannot be mixed or used interchangeably.

E.1 It is submitted that bar on utilization of CENVAT credit of Education Cess and Secondary and Higher Education Cess until 30.06.2017 does not ipso facto vitiate the validity of availment of such CENVAT credit. It is submitted that the concept of 'availment' and 'utilization' are distinct and cannot be used interchangeably. This can be seen evidently seen from reading of the expression contained in Rule 3(1) [taking credit] as against Rule 3(4) [utilization of credit] when read along with Rule 14.

E.2 Further reliance is placed on decision of Hon'ble Supreme Court decision in ***Union of India v. Ind-Swift Laboratories Ltd. 2011 (265) ELT 3 (S.C.)****. The issue before the court was whether interest liability under Rule 14 of CCR would kick in from the date of taking CENVAT credit or from the date of utilization of such CENVAT credit taken. The relevant phrase in Rule 14 read as"Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded". While holding that interest is payable from the date of taking CENVAT credit itself, the Hon'ble Court acknowledged that taking credit and that of utilization of such credit taken are two distinct transactions. It was also*

followed by this Hon'ble Court in ***CCE v. Sri Kumaran Alloys (P) Ltd. 2019 (365) ELT 305 (Mad.).***

E.3 Further reliance is also placed on Board Circular No. F. No. 137/72/2008-CX.4 dated 21.11.2008 wherein while discussing the effect of amendment to Rule 6(3) of CCR w.e.f. 01.04.2008, the Board has clearly admitted the difference between taking of CENVAT credit and its subsequent utilization.

Reliance placed on Osram Surya and Uttam Steel line of decisions is misplaced.

E.4 Reliance has been placed on Hon'ble Supreme Court decisions in ***Osram Surya Pvt. Ltd. v. UOI AIR 2002 SC 2194 and UOI v. Uttam Steel Ltd. (2015) 319 ELT 598 (SC)*** *by the Appellant Department to submit that dead claims cannot be revived.In the first case, the assessee had not availed the credit but was yet to avail the credit. The Court held that there is no inherent right to avail credit. In the present case, the credits have been already availed within the time-limit prescribed under CCR. Hence, the said decision is not applicable.*

E.5 The latter case is on the issue of rebate wherein, again the assessee did not claim it within the time-limit. Both these decisions do not deal with a right that has legally vested already.Hence, the same are not applicable.

Hon'ble Delhi High Court decision in Cellular Operators Association v. Union of India 2018 14 GSTL 522 (Del.) is not applicable to the facts of the present case.

E.6 Edu Cess and SHE Cess was levied by the Central Government. As stated above, Edu Cess and SHE Cess paid by a service provider/ manufacturer on their input services/inputs, were made eligible as CENVAT credit as per

Rule 3(1)(vi) & (via) of the CCR. Rule 3(7) of CCR provided for utilization of CENVAT credit of Edu Cess and SHE Cess for payment of output Edu Cess and SHE Cess respectively. However, vide Notification 15/2015-C.E dated 01.03.2015, the Central Government exempted levy of Education Cess and Secondary and Higher Education Cess w.e.f. 01.06.2015. Therefore, as on 01.06.2015, the CENVAT credit of Education Cess and Secondary and Higher Education Cess availed validly and lying in the books could not be utilized for payment of any output tax liability.

E.7 This inability to utilize the CENVAT credit of Edu Cess and SHE Cess after 01.06.2015 was challenged before Hon'ble Delhi High Court in Cellular Operators Association v. Union of India (2018) 14 GSTL 522 (Del.). In other words, the case before the Hon'ble High Court was with regard to whether Edu Cess and SHE Cess lying un-utilised as CENVAT credit as on the date of their abolishment can be utilised for payment of Basic Excise Duty, Service Tax, etc. This judgment nowhere discussed the validity of the CENVAT Credit of Edu Cess and SHE Cess availed and lying un-utilized in the books. In other words, it is on utilization of credit as per then existing provisions of law and not on availment. Further, even such restriction on utilization was upheld only on account of express statutory bar to that effect in Rule 3(7)(b) and not on account of nature of those Cesses (being in the nature of tax or fee) or any such reasons.

E.8 Hence, it is submitted that the ratio of the said decision is not relevant to the facts of the present case.

E.9 ***It is also submitted that restriction on cross-utilization under erstwhile regime has no bearing on the issue involved.*** *Even National Calamity Contingent Duty, which is a Cess and contained similar restriction on cross-utilization under erstwhile regime has been allowed to transition into GST. Hence, it is submitted that a Cess whose cross-*

utilization was restricted being transitioned into GST is not alien and unheard of to the Appellant Department.

In light of the above, it is submitted that this Hon'ble Court may be pleased to dismiss the Writ Appeal and/or pass any such orders as it may deem fit."

Reasons for Cess being not eligible for carry forward, transition and set off against the Output GST Liability under Section 140 of the CGST Act, are as under.

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 Custom and Tariff Act, 1975, Additional Custom 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. 01.07.2017 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.

32. A closer examination of Explanation 1 and Explanation 2 would indicate that while the first 7 items in Explanation 1 are just repeated in Explanation 2 and we cannot impute any redundancy for such repetition to the Legislature, only Clause (viii) in Explanation 2 included Service Tax leviable under Section 66B of the Finance Act, 1994 in respect of inputs and input services received on or after appointed day, while Explanation 1 talks of inputs held in stock on the appointed day 01.07.2017.

33. The distinction between Explanation 1 and Explanation 2 is that while Explanation 1 was intended to apply for the input Eligible

Duties in respect of stocks and inputs contained in semi-finished or finished goods held in stock as on 01.07.2017, the specified 8 taxes and duties were applicable in respect of inputs and services received on or after 01.07.2017, the appointed day under GST Law. The addition of words "and Taxes" with "Eligible Duties" in Explanation 2 appears to be only on account of addition of "Service Tax" in Explanation 2 which specifies eight duties and taxes for set off.

34. Referring to Sub-section (5), which uses the terms "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 01.07.2017, but invoices in respect of them are received after the said appointed day of 01.07.2017 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 01.07.2017.

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 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.

37. Sub-section (8) of Section 140 provides for a registered person having centralized registration under the existing law shall be allowed to take in his Electronic Credit Ledger, the credit of amount of CENVAT Credit carried forward in the Return furnished under the existing law by him in respect of the period ending with the day immediately preceding the appointed day. The Proviso requires such registered person to furnish Return and the Second Proviso further provides that registered person shall not be allowed to take credit unless the said amount is admissible as Input Tax Credit under CGST Act.

38. Merely because the Assessee in the present case before us is a person having centralized registration has "taken" in his Electronic Credit Ledger the amount of such Education Cess and Secondary and Higher Education Cess, it does not entitle him to utilize the said unutilised amount of Education Cess and Secondary and Higher Education Cess against the Output GST Liability. 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.

The emphasis on the words "taken" or "availed" in contrast with the words "utilised", "adjusted" or "set off" laid by the learned counsel for the Assessee is, with respects, misplaced. These words do not lie in independent watertight silos or compartments. They are rather synonymous in the context of controversy we are dealing with. Finally, what is important is whether the Assessee gets Education Cess, Secondary and Higher Education Cess transitioned under Section 140 of the CGST Act or not. It is like Input Credit being a Fruit, which if found to be spoilt or unfit for consumption, it has to be thrown and if it is still fresh and worthy of being kept and used, it has to be so used. In our opinion, Fruit of Input Credit of Education Cess and Secondary and Higher Education Cess became a spoilt fruit in 2015 itself and was not fit to be carried forward and consumed (adjusted) after 01.07.2017.

39. Carry forward in Electronic Ledger and filing of Form TRAN-1

will not confer any such right on the Assessee and as **Lord Russell** pointed out in an Income Tax matter in the case of ***BSC Footwear Ltd. v. Ridgway (Inpsector of Taxes) [(1972) 83 ITR 269]*** that the Income Tax Law does not march step by step in the divergent footprints of the accountancy provisions. Rightly so, mere accounting practice and accounting entries do not confer a right on the Assessee in the taxation laws much less a vested right which cannot be undone or curtailed by statutory provisions. Therefore, the claim of the Assessee based on the carry forward of unutilised Education Cess and Secondary and Higher Education Cess in the Electronic Ledger does not better its claim in any manner.

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. Sub-section (8) of Section 140 and for that other matter, any of the Sub-sections of Section 140 are not the

provisions in watertight compartments and do not operate in silos and a harmonious reading of various Sub-sections of Section 140, together with the three Explanations at the end of Section 140, has to be made by the Court to give it a purposeful meaning for transition of the Input Tax Credit, against Output GST Liability. The different Sub-sections of Section 140 only identify the class of Assessee; but a common thread of entitlement to carry forward and set off runs through them, of course, subject to Explanations 1, 2 and 3 appended to Section 140 of the Act. If one carefully compares all Sub-sections of Section 140, one can discern that while all other Sub-sections talk of "entitled to take credit", Sub-section (8) uses the word "allowed to take". The utilisation of such credit, even if taken in Electronic Ledger and notified in Form TRAN-1, does not guarantee any such right of utilisation independent of other parts of Section 140 specially ignoring Explanation 3. Sub-section (8), therefore, cannot be said to be an independent Code of law for the dealers holding centralised registration, as canvassed.

41. The contention of the learned counsel for the Assessee that the Assessee was having a centralized registration and Input Education Cess and Secondary and Higher Education Cess being CENVAT under

Cenvat Rules, 2004, deserve to be carried forward and allowed as set off against GST Liability, merely because it had carried forward the same in the Centralised Electronic Credit Ledger, has no substance. Merely because the revenue authorities, after the cessation of levy of Education Cess and Secondary and Higher Education Cess in the year 2015 did not take any action in the contemporary period, until the impugned communication was issued to the Assessee on 09.02.2018, which triggered the filing of the writ petition and asked the Assessee to reverse that entry in the Electronic Ledger, it does not mean that the Assessee became so entitled to carry forward even a dead claim of unutilised Education Cess and Secondary and Higher Education Cess against the Output GST Liability after 01.07.2017. The set off and such adjustments could be allowed only if it clearly fell within the definition of "Eligible Duties" or "Eligible Taxes and Duties" as defined in Explanations 1 and 2. On the contrary, Explanation 3 clearly excluded Cess to be so eligible for carry forward and set off. Therefore, there is no iota of doubt that Cess of any kind except National Calamity Contingent Duty (NCCD), which was so specified in Explanations 1 and 2 specifically could be allowed to be carried forward and adjusted against Output GST Liability. It may be noted here that this NCCD is

allowed to be transitioned not as CENVAT credit, but because it is specifically included as "Eligible Duties" in Explanations 1 and 2 of Section 140 of the Act.

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 01.07.2017.

43. What we have stated above is supported by the recent judgment of Hon'ble Supreme Court in the case of ***Unicorn Industries v. Union of India [decided on 6th December 2019*** *reported in* ***(2020) 3 SCC 492]*** rendered after the judgment of the learned Single Judge dated 05.09.2019 impugned before us and therefore, the same could not be brought to the notice of the learned

Single Judge.

44. The Hon'ble Supreme Court, in the case of ***Unicorn Industries v. Union of India [(2020) 3 SCC 492]*** followed the earlier decision in ***Union of India v. Modi Rubber Limited [(1986) 4 SCC 66]*** and also held earlier two judgments of the Supreme Court by two Judges Bench as *per incuriam* and concluded that a Notification containing an exemption from payment of basic duty of excise for goods specified in the Notification dated 09.09.2003 and cleared by its units located in the State of Sikkim had no reference to the exemption to other duties like National Calamity Contingent Duty (NCCD), Education Cess and Secondary and Higher Education Cess and therefore, the said Notification dated 09.09.2003 could not by implication be extended to exempt even the levy of these Cesses in the form of National Calamity Contingent Duty, Education Cess and Secondary and Higher Education Cess. The relevant extract from the said judgment from the Head Note of SCC is quoted below for ready reference.

"It is obvious that when a notification granting exemption from duty of excise is issued by the Central

Government in exercise of the power under Rule 8(1) simpliciter, without anything more, it must, by reason of the definition of "duty" contained in Rule 2(v) which according to the well-recognised canons of constructiion would be projected in Rule 8(1), be read as granting exemption only in respect of duty of excise payable under the Central Excise Act, 1944. Undoubtedly, by reason of Section 32(4) of the Finance Act, 1979 and similar provision in the other Finance Acts, Rule 8(1) would become applicable empowering the Central Government to grant exemption from payment of special duty of excise, but when the Central Government exercises this power, it would be doing so under Rule 8(1) read with Section 32(4) or other similar provision. The reference to the source of power in such a case would not be just to ***Rule 8(1), since it does not of its own force and on its own language*** *apply to* ***granting of exemption in respect of special duty of excise****, but the reference would have to be to Rule 8(1) read with Section 32(4) or other similar provision. (Para 44)*

Union of India v. Modi Rubber Ltd. (1986) 4 SCC 66 : 1986 SCC (Tax) 781, followed.

When the exemption is granted under the particular provision, it would not cover any other kind of duty of excise imposed under separate Acts. (Para 45)

Union of India v. Modi Rubber Ltd. (1986) 4 SCC 66 :

1986 SCC (Tax) 781, followed.

The Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5-A of the 1944 Act, concerning additional duties under the 1957 Act and additional duties of excise under the 1978 Act. ***It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also****. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption Notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemptions related to cess was not in vogue at the relevant time posed later on vide Section 91 of the 2004 Act and Section 126 of the 2007 Act. The provisions of the 1944 Act and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power*

to exempt NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such ***additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted.***

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1. (2019) 19 SCC 801 : 2019 SCC OnLine SC 421, Bajaj Auto Ltd. v. Union of India (held, per incuriam)

.....

3. (2018) 1 SCC 105, SRD Nutrients (P) Ltd. v. CCE (held, per incuriam)"

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 ELT 3 (SC)]***, 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. The Court held that Section 37 of the Act does not enable the Government to make Rule 57F(4A) to deny that right to the Assessee. Paragraph 6 of the said judgment is quoted below for ready reference.

> *"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."*

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 01.07.2017 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 01.07.2017, 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 01.07.2017 much less against GST Output Liability after 01.07.2017.

48. Another case law which was relied upon by the learned counsel for the Assessee was with regard to words "credit taken or availed" as distinguished from the words "utilized for that purpose". The learned counsel relied upon the decision of the Hon'ble Supreme Court in the case of ***Union of India v. Ind-Swift Laboratories Ltd. [(2012) 25 STR 184 (SC)]***. However, we do not find any need to discuss the said judgment in detail because no difference will be made even after the Assessee is treated as having taken the credit of

Education Cess and Secondary and Higher Education Cess in its Electronic Ledger, but not having utilised it so far until 30th June 2017, because admittedly, the unutilised Education Cess and Secondary and Higher Education Cess could not be cross utilised against the usual Excise Duty payable under the Excise Act, but could be utilized only against the Output Education Cess and Secondary and Higher Education Cess leviable prior to 2015 before being dropped by the Finance Act, 2015.

49. Hypothetically, assuming that such Education Cess or Secondary and Higher Education Cess was re-imposed by the Central Government in the Finance Act, 2016 or 2017 and there was some Output Education Cess or Secondary and Higher Education Cess liability of the Assessee, one could understand the claim of the Assessee of unutilised Input Cenvat in the form of Education Cess and Secondary and Higher Education Cess to be allowed to be set off against such Output Education Cess and Secondary and Higher Education Cess Liability re-imposed by subsequent enactment. But, such is not the case available before us. Therefore, we have no doubt that the Input Cenvat Credit in respect of Education Cess and

Secondary and Higher Education Cess to the extent of unutilised amount lying in its Electronic Ledger was a dead claim and it became infructuous in the hands of the Assessee.

50. The distinction between the Cess, Fees, Tax and Duty was elaborately discussed by the Constitution Bench of the Hon'ble Supreme Court in the case of ***Hingir Rampur Coal Limited v. State of Orissa [AIR 1961 SC 459]*** and we find it useful to quote paragraphs 9 to 13 of the said judgment.

> *"9. The first question which falls for consideration is whether the levy imposed by the impugned Act amounts to a fee relatable to Entry 23 read with Entry 66 in List II. Before we deal with this question it is necessary to consider the difference between the concept of tax and that of a fee. The neat and terse definition of tax which has been given by* ***Latham, C. J., in*** **Matthews v. Chicory Marketing Board** ***(1)*** *is often cited as a classic on this subject. "**A tax**", said Latham, C. J., "**is a compulsory exaction of money** by public authority for public purposes enforceable by law, **and is not payment for services rendered**". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. **It is true that between a tax and a fee there is***

no generic difference. *Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return,* ***a fee is levied essentially for services rendered*** *and as such there is an element of* ***quid pro quo*** *between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee.* ***Tax*** *recovered by public authority invariably goes into the* ***consolidated fund*** *which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and* ***does not become, a part of the consolidated fund***. *It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax- payer*

and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a presence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court.

10. The question about the distinction between a tax and a fee has been considered by this Court in three decisions in 1954. In **The Commissioner, Hindu Religious**

Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt *the vires of the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951), came to be examined. Amongst the sections challenged was Section 76(1). Under this section every religious institution had to pay to the Government annual contribution not exceeding 5% of its income for the services rendered to it by the said Government; and the argument was that the contribution thus exacted was not a fee but a tax and as such outside the competence of the State Legislature. In dealing with this argument Mukherjee, J., as he then was, cited the definition of tax given by Latham, C.J., in the case of Matthews and has elaborately considered the distinction between a tax and a fee. The learned judge examined the scheme of the Act and observed that "the material fact which negatives the theory of fees in the present case is that the money raised by the levy of the contribution is not earmarked or specified for defraying the expense that the Government has to incur in performing the services. All the collections go to the consolidated fund of the State and all the expenses have to be met not out of those collections but out of the general revenues by a proper method of appropriation as is done in the case of other Government expenses". The learned judge no doubt added that the said circumstance was not conclusive and pointed out that in fact there was a total absence of any*

co-relation between the expenses incurred by the Government and the amount raised by contribution. That is why Section 76(1) was struck down as ultra vires.

11. The same point arose before this Court in respect of the Orissa Hindu Religious Endowments Act, 1939, as amended by amending Act 11 of 1952 in Mahant Sri Jagannath Ramanuj Das v. The, State of Orissa. Mukherjea, J., who again spoke for the Court, upheld the validity of Section 49 which imposed the liability to pay the specified contribution on every Mutt or temple having an annual income exceeding Rs. 250 for services rendered by the State Government. The scheme of the impugned Act was examined and it was noticed that the collections made under it are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes. They go to constitute a fund which is contemplated by Section 50 of the Act, and this fund to which the Provincial Government contributes both by way of loan and grant is specifically set apart for the rendering of services involved in carrying out the provisions of the Act.

12. The same view was taken by this Court in regard to s. 58 of the Bombay Public Trust Act, 1950 (Act XXIX of 1950) which imposed a similar contribution for a similar purpose in Ratilal Panachand Gandhi v. The State of

Bombay. *It would thus be seen that the tests which have to be applied in determining the character of any impugned levy have been laid down by this Court in these three decisions; and it is in the light of these tests that we have to consider the merits of the rival contentions raised before us in the present petition.*

13. On behalf of the petitioners Mr. Amin has relied on three other decisions which may be briefly considered In P.P.Kutti Keya v. The State of Madras, *the Madras High Court was called upon to consider, inter alia, the validity of Section 11 of the Madras Commercial Crops Markets Act 20 of 1933 and Rules 28(1) and 28(3) framed thereunder. Section 11(1) levied a fee on the sales of commercial crops within the notified area and Section 12 provided that the amounts collected by the Market Committee shall be constituted into a Market Fund which would be utilised for acquiring a site for the market, constructing a building, maintaining the market and meeting the expenses of the Market Committee. The argument that these provisions amounted to services rendered to the notified area and thus made the levy a fee and not a tax was not accepted by the Court. Venkatarama Aiyar, J., took the view that the funds raised from the merchants for a construction of a market in substance amounted to an exaction of a tax. Whether or not the construction of a market amounted to a service to the*

notified area it is unnecessary for us to consider. Besides, as we have already pointed out we have now three decisions of this Court which have authoritatively dealt with this matter, and it is in the light of the said decisions that the present question has to be considered."

51. Such distinctions were also studied and highlighted by a Division Bench judgment of this Court to which one of us (Vineet Kothari,J) was a party in the case of ***Tamil Nadu Minerals Ltd. v. Joint Commissioner of Income Tax [TCA No.1806 of 2008 dt. 22.04.2019***, where the question involved was whether the 'nomination charges' paid by the Government Company M/s. Tamil Nadu Minerals Limited to State under Section 8C(7) of the Minor Mineral Concession Rules was only a "Royalty" and not "Tax, Duty, Cess or Fees" and therefore, the delayed payment thereof did not attract Section 43B of the Income Tax Act, 1961, so as to disallow the same as an expenditure under that Act, because Section 43B of the Income Tax Act disallowed the delayed payment of only a "Tax, Duty, Cess or Fees" and not the "nomination charges" paid by the Mineral Company to the State. In the said judgment, the distinction between these four types of imposts and other related terms were discussed by

the Division Bench in the following manner:

"21.A little research into these imposts would be apposite here. These terms have the connotations delineated by Apex Court and Authors in the following manner:

CESS

21.1.Means a duty in the nature of duty of excise and customs, imposed and collected on motor spirit commonly known as petrol and high speed diesel oil for the purposes of this Act, [Section 2(b), Central Road Fund Act, 2000 (India)].

21.2.Is also a tax, ***but is a special kind of tax****. Generally tax raises revenue which can be used generally for any purpose by the State, Vijayalashmi Rice Mill v. CTO, (2006) 6 SCC 763.*

21.3.The term ***cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing suggested by the name of the cess, such as health cess, education cess, road cess etc****. This is a well settled position of law. However, it also means an assessment or levy. Depending on the context and purpose of levy,* ***cess may not be a tax; it may be a fee or fee as well****. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and*

a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged. As per Sinha, J. (dissenting), conceptually fee and tax stand on different footings; whereas the element of ***tax is based on the principle of compulsory exaction, the concept of fee relates to the principle of quid pro quo****. The validity of tax cannot, therefore, be upheld on the ground that the same would be a fee, State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201.*

21.4.The ***word "cess" is used in Ireland*** *and is still in use in India although the* ***word rate has replaced it in England.*** *It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates, Shinde Bros. v. Commr., AIR 1967 SC 1512: (1967) 1 SCR 548.*

21.5.Means the goods and services tax compensation cess levied under Section 8 of Goods and Services Tax (Compensation to States) Act, 2017, [Section 2(1)(c), Goods and Services Tax (Compensation to States) Act, 2017 (India)].

*22.**TAX***

22.1. ***"A tax" is a compulsory exaction*** *of money by public authority for public purposes enforceable by law and is* ***not payment "for services rendered"****. This definition*

brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax payers consent and the payment is enforced by law. The second characteristic of tax is that it is an ***imposition made for public purpose without reference to any special benefit*** *to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected, forms part of the public revenues of the State. As the object of the tax is not to confirm any special benefit upon any particular individual there is, as it is said, no element of "quid pro quo" between the tax payer and the public authority. (**See Findlay Shirras on Science of Public Finance, Vol. 1**). Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay, Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282: 1954 SCR 1005: 20 Cut LT 250.*

22.2. A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the other and equally important characteristic of a tax is, that

the imposition is made for public purpose to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax, Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388: 1954 SCR 1055: 56 Bom LR 1184.

*22.3.**An impost; a tribute imposed on the subject; an excise; tallage.** The general principles of taxation are these: - (1) The subjects of every estate ought to contribute to the support of the Government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation. (2) The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor and to every other person. (3) Every tax ought to be levied at the time or in the manner, in which it is most likely to be convenient for the contributor to pay it. (4) Every tax ought to be so contrived as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the State. Taxes are either direct or indirect. A direct tax is one that is demanded from the very persons who are intended or desired to pay it. Indirect taxes are those*

which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. [Wharton's Law Lexicon.]

*23.**Tax and Fee***

*23.1.The distinction between a tax and a fee lies primarily in the fact that a **tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege.** Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest, (vide Findlay Shirras on Science of Public Finance, Vol. I). Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282: 1954 SCR 1005: 20 Cut LT 250.*

23.2. A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency, State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal, (2004) 5 SCC 155.

23.3.Taxation includes every charge or burden imposed by the sovereign power upon persons, property or property right, for the use and support of the Government and to enable it to discharge its appropriate functions and in that broad definition there is included a proportionate levy upon

persons or property and various other methods or devices by which revenue is extracted from persons and property. ***The term "tax" is to be read in all embracing and sweeping sense.*** *Such methods or device used by the Government from time to time are not ordinarily open to serious questions but their scope and application vary according to the nature of the subject under discussion and the circumstances under which they are used. (Para 47), State of U.P. v. Jaiprakash Associates Ltd., (2014) 4 SCC 720.*

24.Taxation and impost - "Taxation" includes the imposition of any tax or impost, whether general or local or special and "tax" shall be construed accordingly. Though it is not an exhaustive definition and only shows what is included in the word one is struck immediately by its width of language. Though it speaks of any tax or impost, it goes a step further and adds "whether general or local or special", indicating thereby that no special or local considerations are relevant and even a general non discriminatory levy must be regarded as taxation. The definition of taxation speaks of impost. The word "impost" in its general sense means a tax or tribute or duty and may be on persons or on goods. In a special sense it means a duty on imported goods and on merchandise, Sea Customs Act, S. 20(2), In re, AIR 1963 SC 1760, 1784: (1964) 3 SCR 787: (1964) 1 ITJ 671

*25.**FEES***

25.1.Is generally defined to be a charge for a special service rendered to individuals by some governmental agency. ***The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service,*** *though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases, Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282: 1954 SCR 1005: (1954) 1 MLJ 596: 20 Cut LT 250.*

25.2.Property peculiar; reward or recompense for services. Also an estate of inheritance divided into three species: (1) fee-simple absolute; (2) qualified or base fee; (3) fee-tail, formerly fee conditional.[Wharton's Law Lexicon.]

*25.3.****Fees are a sort of return or consideration for services rendered,*** *which makes it necessary that there should be an element of quid pro quo in the imposition of a fee. There has to be a co-relationship between the fee levied by an authority and the services rendered by it to the person who is required to pay the fee, Govt. of A.P. v. Hindustan Machine Tools Ltd., (1975) 2 SCC 274.*

25.4. Perquisites allowed to officers in the

administration of justice, as a recompense for their labour and trouble, ascertained either by Acts of Parliament, by rule or order of Court or by ancient usage.[Wharton's Law Lexicon.]

25.5.Means the charges specified by the food authority for clearance of imported food consignments, [Regulation 2(j), Food Safety and Standards (Import) Regulations, 2017 (India)].

*26.**Levy and Fee***

26.1.A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax. It is true that ordinarily a fee is uniform and no account is taken of the varying abilities of different recipients. But absence of uniformity is not a criterion on which alone it can be said that it is of the nature of a tax. A fee being a levy in consideration of rendering service of a particular type, correlation between

the expenditure incurred by the Government and the levy must undoubtedly exist, but a levy will not be regarded as a tax merely because of the absence of uniformity in its incidence or because of compulsion in the collection thereof, nor because some of the contributories do not obtain the same degree of service as others may, ***Sudhindra Thirtha Swamiar v. Commr., Hindu Religious and Charitable Endowments, AIR 1963 SC 966, 975: 1963 Supp (2) SCR 302****.*

*26.2.**In fees there is always an element of "quid pro quo" which is absent in a tax.** Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition of a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes, Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400: 1954 SCR 1046.*

*27.**Fee and Tax***

*27.1.**Between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities;** but whereas a tax is imposed for public*

purposes and is not and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee, Hingir Rampur Coal Co. Ltd. v. State of Orissa, AIR 1961 SC 459, 464: (1961) 2 SCR 537.

27.2.Conceptually fee and tax stand on different footings; whereas the element of tax is based on the principle of compulsory exaction, the concept of fee relates to the principle of quid pro quo. The validity of tax cannot, therefore, be upheld on the ground that the same would be a fee, State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC

201.

*28.**LEVY***

28.1.Means to realise or to collect. Only necessary condition is that the proceedings for realisation of the fine must be commenced within the stipulated period, Mehtab Singh v. State of U.P., (1979) 4 SCC 597: 1980 SCC (Cri) 142.

28.2.Includes proceedings for assessment, Ashok Singh v. CED, (1992) 3 SCC 169.

28.3.Levy includes not only the imposition of the charge but also the whole process up to raising of the demand, Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536.

28.4.The term "levy" is wider in its import than the term "assessment". It may include both "imposition" as well as "assessment", CCE v. Smithkline Beecham Consumer Health Care Ltd., (2003) 2 SCC 169.

28.5.The act of raising money or men. [Wharton?s Law Lexicon.]

28.6.The term "levy" it is held, is an expression of wide import. It includes both imposition of a tax as well as its quantification and assessment, Ujagar Prints (2) v. Union of India, (1989) 3 SCC 488.

*29.**Levy and collect** - In taxing statute the words "levy" and "collect" are not synonymous terms, while "levy"*

would mean the assessment or charging or imposing tax, "collect" would mean the physical realisation of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same. The enforcement of levy could only mean realisation of the tax imposed or demanded, Somaiya Organics (India) Ltd. v. State of U.P., (2001) 5 SCC 519.

*30.**Levy and collection** - While the expression "levy" may include both the process of taxation as well as the determination of the amount of tax or duty, the expression "collection" refers to actual collection of the payable duty or the tax, as the case may be. Since the taxable event for attracting excise duty or countervailing duty is the manufacture or import of excisable goods into the State, the charge of incidence of duty stands attracted as soon as the taxable event takes place and the facility of postponement of collection of duty under the Act or the rules framed thereunder, can in no way affect the incidence of duty on the imported goods, S.K. Pattanaik v. State of Orissa, (2000) 1 SCC 413.*

*31.**Levy, Imposition and Assessment***

The term "levy" appears to be wider in its import than the term "assessment". It may include both "imposition" of a tax as well as assessment. The term "imposition" is generally used for the levy of a tax or duty by legislative provisions

indicating the subject matter of the tax and the rates at which it has to be taxed. The term "assessment", on the other hand, is generally used in this country for the actual procedure adopted in fixing the liability to pay a tax on account of particular goods or property or whatever may be the object of the tax in a particular case and determining its amount, Asstt. Collector of Central Excise, CCE v. National Tobacco Co. of India Ltd., (1972) 2 SCC 560: AIR 1972 SC 2563: (1973) 1 SCR 822: 1973 Tax LR 1607.

*32.**DUTY***

32.1.Means a duty of customs leviable under the Act, [Section 2(15), Customs Act, 1962 (India)].

32.2.A tax, an impost or imposition; also an obligation. [Wharton's Law Lexicon.]

32.3.Duty, direct taxes and indirect taxes - The word "duty" means an indirect tax imposed on the importation or consumption of goods. "Customs" are duties charged upon commodities on their being imported into or exported from a country. The expression direct taxes includes those assessed upon the property, person, business, income, etc., of those who are to pay them, while indirect taxes are levied upon commodities before they reach the consumer and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity, Union of India v. Nitdip Textile Processors (P) Ltd., (2012) 1 SCC 226.

*33.**ROYALTY***

33.1.It is a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee, State of Orissa v. Titaghur Paper Mills Co. Ltd., 1985 Supp SCC 280.

33.2."Royalty" according to Jowitts' Dictionary of English Law means "a payment reserved by the grantor of a patent, lease of a mine or similar right and payable proportionately to the use made of the right by the grantee", Distt. Council, Jowai Autonomous Distt. v. Dwet Singh Rymbai, (1986) 4 SCC 38.

33.3.Royalty in general connotes the State's share in the goods upon which the rights of its exploitation are conferred upon any person or the group of persons. If the royalty cannot be claimed by any individual, much less the controversial items being its attribute, even if assumed, can be claimed by a citizen, State of H.P. v. Raja Mahendra Pal, (1999) 4 SCC 43.

33.4.In the transaction of patent, royalty is a payment to a patentee by agreement on every article made according to his patent or to an author by publisher on every copy of his book sold or to the owner of mineral for the right of working the same on every tone or other weight raised, Pradeep C. Mody v. Sashikant C. Mody, AIR 1998 Bom 351.

33.5.Payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised. [Wharton's Law Lexicon.]

33.6.In its primary and natural sense "royalty", in the legal world, is known as the equivalent or translation of jura regalia or jura regia. Royal rights and prerogatives of a sovereign are covered thereunder. In its secondary sense the word "royalty" would signify, as in mining leases, that part of the reddendum, variable though, payable in cash or kind, for rights and privileges obtained, Inderjeet Singh Sial v. Karam Chand Thapar, (1995) 6 SCC 166.

*34.**Royalty and compensation***

"Royalty" means remuneration paid to an author in respect of the exploitation of a work, usually referring to payment on a continuing basis (e.g. 10% of the sale price) rather than a payment consisting of a lump sum in consideration of acquisition of rights. It may also be applied to payment to performers. In the context of the Act, royalty is a genus and compensation is a species. Where a licence has to be granted, it has to be for a period. A "compensation" may be paid by way of annuity. A "compensation" may be payable on a periodical basis, as apart from compensation, other terms and conditions can also be imposed. The

compensation must be directed to be paid with certain other terms and conditions which may be imposed, Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd., (2008) 13 SCC 30."

52. The learned counsel for the Revenue relied upon the decision of the Hon'ble Supreme Court in the case of ***Union of India v. Uttam Steel Limited [(2015 (13) SCC 209]*** on the issue of the claim of the Assessee having become dead claim prior to the introduction of GST Regime on 01.07.2017 and similarly, the Hon'ble Supreme Court in the aforesaid case held that the claim had already became dead, the extended period of limitation by way of amendment to Section 11B of the Act would not revive such a claim. **Hon'ble Mr.Justice R.F.Nariman** speaking on behalf of the Bench, said in paragraph 10 that there is no doubt whatsoever that the period of limitation being procedural or adjectival law would ordinarily be retrospective in nature, but with one caveat that the claim made under the amended provision should not itself have been a dead claim in the sense that it was already time barred before the amended Act with the larger period of limitation comes into force. The Hon'ble Supreme Court relied upon the earlier decision in this regard in the case of ***S.S. Gadgil v. Lal and***

Co. [AIR 1965 SC 171] in the following manner.

"10. We have heard learned counsel for the parties and Shri Bagaria, the learned Amicus Curiae at some length. There is no doubt whatsoever that a ***period of limitation being procedural or adjectival law would ordinarily be retrospective in nature. This, however, is with one proviso super added*** *which is that the claim made under the amended provision should not itself have been* ***a dead claim*** *in the sense that it was time barred before an Amending Act with a larger period of limitation comes into force. A number of judgments of this Court have recognised the aforesaid proposition. Thus, in* ***S.S. Gadgil v. Lal and Co.****, MANU/SC/0122/1964 : AIR 1965 S.C. 171, this Court stated:-*

> *"13. As we have already pointed out, the right to commence a proceeding for assessment against the assessee as an agent of a non-resident party under the Income Tax Act before it was amended, ended on March 31, 1956. It is true that under the amending Act by Section 18 of the Finance Act, 1956, authority was conferred upon the Income Tax Officer to assess a person as an agent of a foreign party under Section 43 within two years from the end of the year of assessment. But authority of the Income Tax Officer under the Act before it was amended by the Finance*

Act of 1956 ***having already come to an end, the amending provision will not assist him to commence a proceeding even though at the date when he issued the notice it is within the period provided by that amending Act****. This will be so, notwithstanding the fact that there has been no determinable point of time between the expiry of the time provided under the old Act and the commencement of the amending Act. The legislature has given to Section 18 of the Finance Act, 1956, only a limited retrospective operation i.e. up to April 1, 1956, only. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorise the Income Tax Officer to commence proceedings which before the new Act came into force had by the expiry of the period provided, become barred."*

53. The same Bench of Hon'ble Supreme Court in a later case of ***Jayam and Co. v. Assistant Commissioner and Others [(2016) 15 SCC 125]*** in a case under Tamil Nadu Value Added Tax Act, 2006, held that it is trite law that whenever concession is given by a statute

or notification etc., the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the dealers to get benefit of input tax credit, but it is a concession granted by virtue of Section 19 and therefore, the conditions for availing such Input Tax Credit have to be fulfilled. Paragraphs 11 to 13 of the said judgment authored by the **Hon'ble Mr.Justice A.K.Sikri,** are quoted below for ready reference.

> *"11. From Sub-section (10) onwards, provisions are made to follow the procedure and fulfill the requisite conditions for availing ITC. For the purposes of this particular issue, Sub-section (10) is the material provision. This provision, which is couched in negative terms, categorically stipulates that such ITC would be admissible to the registered dealer and* ***he would not be entitled to claim this credit 'until the dealer receives an original tax invoice duly filled, signed and issued by a registered dealer from where the goods are purchased*** *.....'. Further, such original tax invoice should evidence the amount of input tax. So much so, even if the original tax invoice is lost, the obligation cast on the registered dealer is to obtain duplicate or carbon copy of such tax invoice from the selling dealer and only then input tax is allowed.*
>
> *From the aforesaid scheme of Section 19, following*

significant aspects emerge:

(a) ITC is a form of concession provided by the Legislature. It is not admissible to all kinds of sales and certain specified sales are specifically excluded.

(b) Concession of ITC is available on certain conditions mentioned in this Section.

(c) One of the most important condition is that in order to enable the dealer to claim ITC it has to produce original tax invoice, completed in all respect, evidencing the amounts of input tax.

*12. **It is a trite law that whenever concession is given by statute or notification etc. the conditions thereof are to be strictly complied with in order to avail such concession**. Thus, it is not the right of the 'dealers' to get the benefit of ITC but its a concession granted by virtue of Section 19. As a fortiori, conditions specified in Section 10 must be fulfilled. In that he, we find that Section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect de hors the issue of ITC as per the Section19 of the VAT Act, possibly the arguments of Mr.Bagaria would have assumed some relevance. But, keeping in view the scope*

of the issue, such a plea is not admissible having regard to the plain language of Sections of the VAT Act, read along with other provisions of the said Act as referred to above.

13. For the same reasons given above, challenge to constitutional validity of Sub-section (20) of Section 19 of VAT Act has to fail. When a concession is given by a statute, the Legislature has power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. ***There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for Section 19 of the VAT Act****. That apart, we find that there were valid and cogent reasons for inserting Section 19(20). Main purport was to protect the Revenue against clandestine transactions resulting in evasion of tax. ..."*

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 01.07.2017 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 GSTR 338]*** decided on 15.07.2018 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 ELT 5 (SC)]***.

"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 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 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.***

17. The decision in Eicher Motors Limited and Another (supra) was distinguished in the case of Osram Surya (P) Ltd. Versus Commissioner of Central Excise, Indore, 2002 (142) ELT 5 (SC), wherein proviso to Rule 57 introducing six months time limit for claiming MODVAT credit benefit was challenged. Arguments predicated on vested right being annulled and reduced to nothing were rejected, recording as under -

> *"7. Having heard the arguments of the parties and after considering the Rule in question, we think that by introducing the limitation in the said proviso to the Rule, the statute has not taken away any of the vested rights which had accrued to the manufacturers under the Scheme of MODVAT. That vested right continues to be in existence and what is restricted is the time within which the manufacturer has to enforce that right. The appellants, however, contended that imposition of a limitation is as good as taking away the vested right. In support of their argument, they*

have placed reliance on a judgment of this Court in Eicher Motors Ltd. v. Union of India (1999) 2 SCC 361 wherein this Court had held that a right accrued to an assessee on the date when it paid the tax on the raw materials or the inputs would continue until the facility available thereto gets worked out or until those goods existed. In that background, this Court held that by Section 37 of the Act, the authorities concerned cannot make a rule which could take away the said right on goods manufactured prior to the date specified in the rule concerned. In the facts of Eicher case (1999) 2 SCC 361 it is seen that by introduction of Rule 57-F(4-A) to the Rules, a credit which was lying unutilized on 16-3- 1995 with the manufacturer was held to have lapsed. Therefore, that was a case wherein by introduction of the Rule a credit which was in the account of the manufacturer was held not to be available on the coming into force of that Rule, by that the right to credit itself was taken away, whereas in the instant case by the introduction of the second proviso to Rule 57-G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has

not been taken away by the introduction of the proviso to the Rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law. Therefore, in our opinion, the law laid down by this Court in Eicher case (1999) 2 SCC 361 does not apply to the facts of these cases. ***This is also the position with regard to the judgment of this Court in CCE v. Dai Ichi Karkaria Ltd.(1999) 7 SCC 448."***

57. The Hon'ble Supreme Court in the case of ***Osram Surya*** held that Second Proviso inserted in the Central Excise Rules Rule 57G with effect from 29.06.1995 does not affect the substantive or vested right of the manufacturer to take credit, but only introduces a procedural restriction which is legally permissible by providing a time limit of six months. Paragraphs 7 and 8 of the said judgment are also quoted below for ready reference.

"7. Having heard the arguments of the parties and after considering the Rule in question, ***we think that by introducing the limitation in the said proviso to the Rule, the statute has not taken away any of the vested rights which had accrued to the manufacturers under the Scheme of Modvat.*** *That vested right continues to be in existence and what is restricted is the time within which the manufacturer*

has to enforce that right. The appellants, however, contended that imposition of a limitation is as good as taking away the vested right. In support of their argument, they have placed reliance on a judgment of this Court in Eicher Motors Ltd. v. Union of India [1999 (106) ELT 3 SC) *wherein this Court had held that a right accrued to an assessee on the date when it paid the tax on the raw-materials or the inputs would continue until the facility available thereto gets worked out or until those goods existed. In that background, this Court held that by Section 37 of the Act, the authorities concerned cannot make a Rule which could take away the said right on goods manufactured prior to the date specified in the concerned Rule. In the facts of Eicher's case (supra), it is seen that by introduction of Rule 57F(4A) to the Rules, a credit which was lying unutilized on 16.3.1995 with the manufacturer was held to have lapsed. Therefore, that was a case wherein by introduction of the Rule a credit which was in the account of the manufacturer was held not to be available on the coming into force of that Rule, by that the right to credit itself was taken away, whereas in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not*

been taken away by the introduction of the proviso to the Rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law. Therefore, in our opinion, ***the law laid down by this Court in Eicher's case (supra) does not apply to the facts of these cases****. This is also the position with regard to the judgment of this Court in* ***Collector of Central Excise, Pune & Ors. V. Dai Ichi Karkaria Ltd. & Ors. [1997 (7) SCC 448]****.*

8. It is vehemently argued on behalf of the appellants that in effect by introduction of this Rule, a manufacturer in whose account certain credit existed, would be denied of the right to take such credit consequently, as in the case of Eicher (supra), ***a manufacturer's vested right is taken away****, therefore, the Rule in question should be interpreted in such a manner that it did not apply to cases where credit in question had accrued prior to the date of introduction of this proviso.* ***In our opinion, this argument is not available to the appellants because none has questioned the legality or the validity of the Rule in question****, therefore, any argument which in effect questions the validity of the Rule, cannot be permitted to be raised. The argument of the appellants that there was no time whatsoever given to some of the manufacturers to avail the credit after the introduction of the Rule also is based on arbitrariness of the Rule, and the same*

also will have to be rejected on the ground that there is no challenge to the validity of the Rule."

Likewise before us also, there is no challenge to any provision of CGST Act or Rules made thereunder.

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 01.07.2017 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 01.07.2017.

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.

62. For the aforesaid reasons, we are inclined to allow the appeal of the Revenue and with all due respect for the learned Single Judge, set aside the judgment of the learned Single Judge dated 05.09.2019 and we hold that the Assessee was not entitled to carry forward and set off of unutilised Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess against the GST Output Liability with reference to Section 140 of the CGST Act, 2017. The appeal of the Revenue is allowed. CMP No.690 of 2020 is closed. Costs easy.

63. We place on record our appreciation for the able assistance and well drafted written arguments of the learned counsel on both sides.

Index : Yes
Internet : Yes

(V.K.J.) (K.R.J.)
16.10.2020

kpl

To
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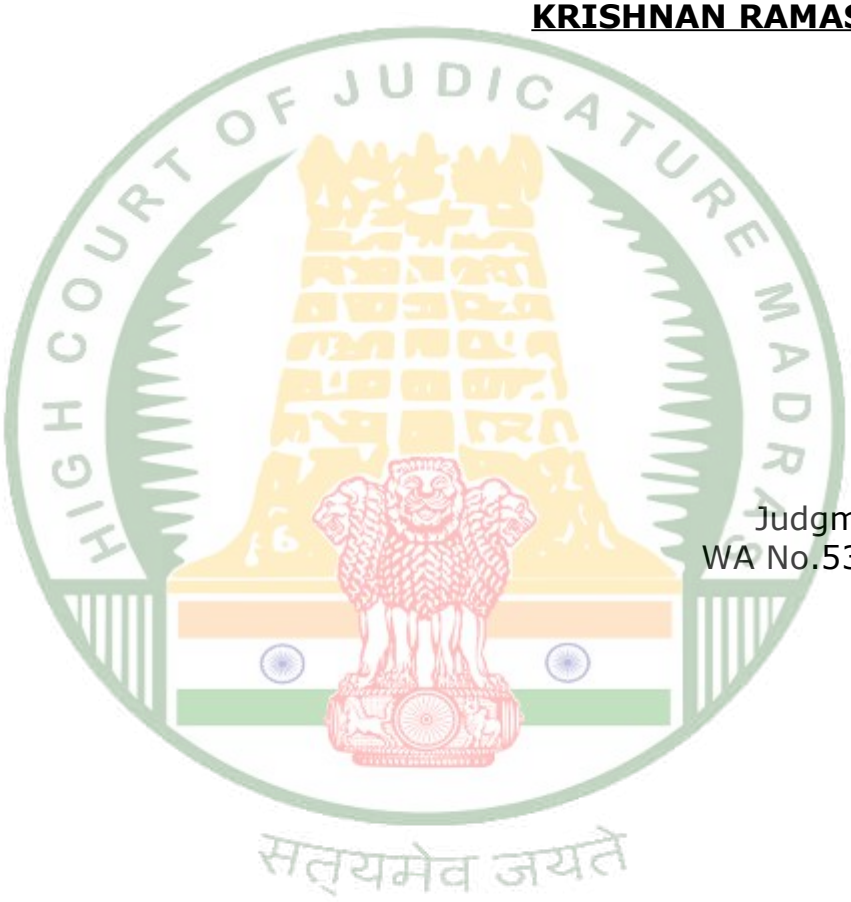
DR.VINEET KOTHARI, J,
AND
KRISHNAN RAMASAMY, J.



Judgment in
WA No.53 of 2020

16.10.2020