



Tax alert: CESTAT holds that unutilized credit of cess from erstwhile service tax/excise regime cannot be transitioned to GST regime

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The larger bench of CESTAT has held that unutilized credit of education cess (EC), secondary and higher education cess (SHEC) and Krishi Kalyan Cess (KKC) (cess) cannot be transitioned to GST regime and refund of unutilized credit of cess cannot be claimed.

In a nutshell



The larger bench of CESTAT has held that unutilized credit of EC, SHEC and KKC cannot be transitioned into GST regime in the absence of specific provision. Refund of such unutilized cess can also not be claimed.



Under the erstwhile service tax/ excise regime, Cenvat Credit Rules 2004 did not permit cross utilization of cess for payment of excise duty/ service tax or to claim refund of the unutilised cess amounts.



Cess credit became a dead claim in the year 2015 itself when they were abolished /exempted and therefore, there was no question of allowing a carry forward of the same under GST regime.



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Background:

- The appellant had availed CENVAT credit of education cess (EC), secondary and higher education cess (SHEC) and Krishi Kalyan Cess (KKC) (all three referred to as 'cess') on inputs and input services prior to abolition of these cesses in 2015.
- On the date of the transition into GST regime, the appellant had closing balances of these cess credit in its CENVAT account.
- The appellant initially carried forward these balances to GST regime in Form TRAN-1. However, the credit was subsequently reversed upon the objection raised by the audit team alleging that it was not permissible under Section 140 of the CGST Act.

- Thereafter, the appellant filed a refund application under Section 142(3) of the CGST Act read with Section 11B of the Central Excise Act, 1944, seeking refund of the reversed credit.
- The refund was rejected by lower authorities and hence an appeal was filed before the CESTAT.
- The matter was referred to the larger bench of the CESTAT as the division bench was confronted with contradictory views¹ taken by co-ordinate benches of Delhi CESTAT on the issue of refund eligibility of unutilised balances of the cess.
- The appellants, supported by the intervenors, relied on the jurisprudence recognizing that CENVAT credit is a vested and indefeasible right. Reliance was placed on the Supreme Court's decisions in the case of Eicher Motors² and Slovak India³ to contend that accumulated balances of cess could not lapse in the absence of an express statutory mandate. Amongst others, reliance was also placed on the CESTAT judgement in the case of Nu-Vista Ltd⁴., wherein refund of cess balance had been permitted.
- The Revenue, on the other hand, relied on the cases of NMDC Ltd.⁵, Gauri Plasticulture⁶, Sutherland Global Services⁷, Cellular Operators Association of India⁸, Banswara Syntex⁹, Muthoot Finance¹⁰ etc., to submit that the cess balance had become non-utilisable upon their abolition and that the pre-GST law did not provide any mechanism for their refund or merger. Also, the transition provisions under GST law did not create any fresh or independent right to claim refund.

CESTAT larger bench judgement¹¹

- The larger bench of the CESTAT held that there are no provisions under the GST law which allows transitioning of the cess credit to the GST regime. Also, the refund is not eligible *ab initio* and thus no refund can be granted.
- The CESTAT held that –
 - Cess is not included in the list of taxes and duties transitioning into GST regime
 - The appellants did not seek recourse to claim refund of the cess credit nor claimed to merge the Cess' credit with the cenvat credit of Excise Duty / Service Tax under the erstwhile regime.
 - Reliance was placed on the cases of Cellular Operators¹² and Banswara Syntex¹³ to hold that cess was discontinued in 2015 itself. It was not fungible against service tax/ central excise credit nor refund was eligible. Thus, credit of cess cannot be a vested right/ indefeasible right
 - Following the Madras High Court judgement in the case of Sutherland global services¹⁴ the larger bench of the CESTAT observed that balance cess credit has become dead cenvat credit when they were abolished / exempted; hence the question of refunding the same would not arise.

¹Nu Vista Ltd. v. Commissioner 2022 (381) E.L.T. 681 (Tri. - Del.), NMDC Ltd – Final Order No. 55722/2024 dated 02-05-2024 (Appeal No. E/50793/2021);

² Eicher Motors Limited and Another v. Union of India and Others, (1999) 2 SCC 361 = 1999 (106) E.L.T. 3 (S.C.)

³ U.O.I. Vs Slovak India Trading Co Pvt Ltd. 2008(223) ELT A 170(S.C.)

⁴ Nu Vista Ltd. v. Commissioner 2022 (381) E.L.T. 681 (Tri. - Del.)

⁵ NMDC Ltd – Final Order No. 55722/2024 dated 02-05-2024 (Appeal No. E/50793/2021)

⁶ Gauri Plasticulture Vs CCE 2019(30) GSTL 224 (BOM),

⁷ Assistant Commissioner of CGST And Central Excise, Chennai Vs. Sutherland Global Services Pvt. Ltd. - (2023) 6 Centax 99 (Mad.)

⁸ Cellular Operators Association of India v. Union of India [2018 (14) G.S.T.R. 338]

⁹ Banswara Syntex Ltd.versus Commr. of C. Ex & Service Tax, Udaipur {2019 (365) E.L.T. 773 (Raj.)}

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

¹¹ M/s. KEI Industries Ltd. vs. Commissioner of Central Goods & Service Tax & Central Excise-Alwar, CESTAT Delhi - Excise Appeal No. 50090 of 2024

¹² Cellular Operators Association of India vs. Union of India - 2018 (14) G.S.T.L. 522 (Del.)

¹³ Banswara Syntex Ltd. vs. Commr. Of C. Ex. & Service Tax, Udaipur – 2019 (365) E.L.T. 773 (Raj.)

¹⁴ Assistant Commissioner of CGST And Central Excise, Chennai Vs. Sutherland Global Services Pvt. Ltd. - (2023) 6 Centax 99 (Mad.)

- Regarding the timelines for claiming refund, it was observed that, once the normal avenue within the framework of erstwhile law is not utilized, they cannot take recourse to the new regime's law to claim immunity from time-bar. The refund claims of the cess balance, if filed after 1 March 2016 / 1 June 2016 would be time-barred.

Comments:

The larger bench of CESTAT has evaluated the issue in detail, distinguished the earlier jurisprudence on the subject and delivered a clear position that unutilized cess credits of erstwhile regime, were not eligible to be transitioned to GST regime nor could a refund of the same be claimed. It was due to the contradictory division bench judgements in the case of Nu Vista¹⁵ and NMDC¹⁶, that resulted in constitution of a larger bench in this case. The larger bench reiterates the principle that the eligibility for input tax credit or refund needs to be decided, based on the provisions of the law and by itself cannot be regarded as a 'vested right' / 'indefeasible right'.

Recently, in the context of abolition of GST compensation cess, the Supreme court has admitted a writ petition challenging the non-transition of accumulated compensation cess credit. It would be important to know how the court decides this issue.

¹⁵ Nu Vista Ltd. v. Commissioner 2022 (381) E.L.T. 681 (Tri. - Del.)

¹⁶ NMDC Ltd – Final Order No. 55722/2024 dated 02-05-2024 (Appeal No. E/50793/2021).

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