Carry forward of KKC, EC and others into GST - High Court Decision

CA Venkatprasad Pasupuleti
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Education Cess was being levied on Central Excise and Service Tax from 10.09.2014.

Education Cess paid on the purchase was available as a credit for payment of education cess on payment on the output removal. The credit of cess was not able to use for the payment of duty.

Later, when the rate of excise duty was increased from 12% to 12.5%, cess was rescinded. Thereby the accumulated credit was not able to be used. Similar was in case of Krishi Kalyan Cess credit in case of service tax.

Now whether this accumulated credit of cess can be carried forward into the GST under the transition provision is the issue, there were contradicting views on this some in favor and some against. Few of them have carried forward the credit, however recently, there were news articles published in the newspapers that companies carried forwarded the credit of KKC may face fine/penalties **citing that the recent judgment of Hon'ble Delhi High Court in case of Cellular Operators Association of India and Others Vs UOI and Others 2018-TIOL-310-HC-DEL-ST.**

In this background, an attempt has been made in this article to explain the Delhi High Court decision and its implication on the KKC/EC carried forwarded into GST.

Background of the Case:

Under the CENVAT Credit Rules, 2004 (CCR, for short), CENVAT credit of EC and SHE Cess can be availed and utilized for payment of EC and SHE Cess on manufactured goods or output services while the cross-utilization of EC and SHE towards payment of Excise Duty or Service Tax was not permitted.

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However, EC and SHE cess were exempted (on excisable goods w.e..f 01.03.2015 and taxable services w.e.f. 01.06.2015).The credit of EC/SHEC on inputs received after 1.3.2015 but charged with EC/SHEC is allowed to utilize for payment of Excise duty/ service tax (similarly for the input services received after 01.06.2015).

However, the unanswered question remains what to do with the unutilized credit of EC/SHEC lying as on 01.03.2015/01.06.2015 whether it lapses or can be sought as refund or used for the payment of tax/duty?

A writ petition has been filed inter alia seeking direction that the credit accumulated on 01st June 2015 on account of EC and SHEC should be allowed to be utilized for payment of service tax.

Contentions:

The petitioners claim a vested right to avail benefit of the unutilized amount of EC or SHE credit, which was available and had not been set off as on 1st March 2015 and 1st June 2015 for payment of tax on excisable goods and taxable services respectively.

The contention was that EC and SHE were subsumed in the Central Excise Duty, the general rate of which was increased from 12% to 12.5%, and service tax, which was increased from 12.36% to 14%.

Reliance is placed upon the Budget Speech of the Finance Minister and the memorandum explaining provisions of Finance Bill, 2015. Reference is also made to the TRU letter F.No.334/5/2015-TRU dated 28th February 2015.

Decision:

The court has held that Manufacturers and Service providers are entitled to avail and utilize EC and SHEC against the liability of EC and SHEC before the cut-off dates i.e., 01st March 2015 in case of Goods and 01st June 2015 in case of Services, as the EC and SHEC was ceased to be applicable after the said dates.

The provisos added to Rule 3, sub-rule (7) in clause (b) allowing utilization of EC and SHEC (availed on inputs, capital goods or service received after 01st June 2015) for making payment of service tax is in the nature of concessions confined to a limited and narrow set of cases which are distinct and separate and are not of general application.

Therefore, the same cannot be applied to the balance of EC and SHEC available as on 01st March 2015 and 01st June 2015 as the said benefit of cross-utilization was never available earlier and this amounts to seeking the additional benefit and concession beyond those granted.

Hence, Article 14 was not offended. Further, the Hon'ble High Court held that there is no provision in the law which states that EC and SHEC are subsumed into Service Tax and Excise Duty to allow the cross-utilization of credit.

Thereby decision concluded that the credit of EC and SHEC cannot be used for the payment of excise duty.

Implications on the Credit carried forwarded into GST:

The decision of the Hon'ble High court restricted to the subject of cross-utilization of EC and SHEC against the payment of Central Excise or Service Tax. This judgment nowhere discusses the eligibility of CENVAT Credit of EC and SHEC and the same lapsing. Therefore it is of no dispute that the credit was eligible and did not lapse.

Section 140 of CGST Act, 2017 entitles a registered person to carry forward the closing balance of ***CENVAT Credit*** in the last return filed under the existing law. 'CENVAT Credit' has been defined in the explanation to section 142 giving the meaning assigned to it under Central Excise Act or rules issued thereunder.

By virtue of Rule 3(1)/(1A) of CCR, 2004, EC, SHEC and KKC are treated as 'CENVAT credit'. Though EC, SHEC, and KKC (for brevity 'Cess') are ceased to be applicable, there is no corresponding provision in the old laws for the lapse of such credits (unutilized portion). Therefore, as per Section 140 of CGST Act, 2017, the balance of Cess lying as closing balance in the last return can be carried forward to GST.

Rule 3(4) or 3(7) of CCR, 2004 provides restriction for utilization of Credit of Cess cross utilization for payment of service tax/Excise duty. From the above-referred discussion, it is clear that carry forward of Credit into GST and utilization of the same are two different aspects and cannot be mixed. This also shows that carry forward of 'Cess' into GST does not get impacted by the provisions restricting their utilization under CENVAT credit Rules, 2004.

The Hon'ble Delhi High Court has only discussed the second part i.e., cross-utilization of EC and SHEC but has not discussed the first part i.e. CENVATABILITY of 'Cess' which is essential to determine whether such credits can be carried forward to GST or not. As 'Cess' passed the first criteria, the credit of the same can be carried forward to GST.

As the issue decided by the Delhi High Court is related to cross-utilization of EC, SHEC which does not have any impact on CENVATABILITY of the cesses, **the said decision does not have any impact on the credit carried forwarded into GST.**

Further, while giving the above judgment High Court has observed that there is no specific provision in existing laws stating that EC and SHEC are subsumed in Service Tax and Excise Duty. While introducing GST, Central Government has

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amended the Constitution of India by subsuming the Service tax and Excise Duty into GST and an article has been included requiring the GST Council to suggest the Cesses that should be subsumed into GST.

The list of Cesses subsumed into GST also includes KKC and also there are exists repeal provisions withdrawing levy of 'Cess' as consequential to the introduction of GST. Therefore, on this aspect also the Delhi High Court Judgment can be differentiated and can be said that it does not have any impact on carrying forward of credit into GST. However, the contrary views also being expressed.

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The authors can also be reached at venkataprasad@hiregange.com, laxman@hiregange.com

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finally we can carry forward KKC into GST or Not?

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Not eligible for carrying forward into GST in view of the retrospective amendment. The option of claiming refund can be explored.

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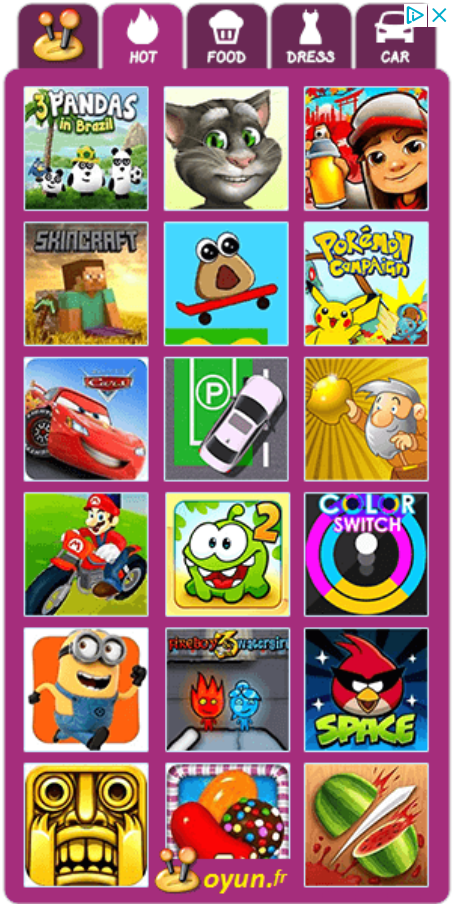

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