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EDUCATION CESS – THE SPOILT FRUIT

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The recent decision of the Division Bench of the Hon'ble High Court of Madras, holding that the balance of credit of Education CESS (EC), Secondary and Higher Education CESS (SHEC) and Krish Kalyan CESS (KKC) as on 30.06.2017 could not be carried forwarded into GST regime under Section 140 of the CGST Act, has come as another shock.

The main reason adduced by the Hon'ble High Court to deny such transition is evident from the following observations of the Court

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

With due respect, what is missed is the fact that the fruit has not been spoilt in 2015, but made into a juice and packed in a canister, as can be observed from the below extract from the Budget Speech of the Finance Minister in 2015.

118. As part of the movement towards GST, I propose to subsume the Education Cess and the Secondary and Higher Education Cess in Central Excise Duty. In effect, the general rate of Central Excise Duty of 12.36% including the cesses is being rounded off to 12.5%.

121. Introduction of GST is eagerly awaited by Trade and Industry. To facilitate a smooth transition to levy of tax on services by both the Centre and the States, it is proposed to increase the present rate of service tax plus education cesses from 12.36% to a consolidated rate of 14%.

So, the subsuming of EC and SHEC with the Basis Excise Duty and Service Tax was, keeping GST in mind. When such Excise duty and Service Tax is subsumed into GST, why not the balance of EC and SHEC, which are already subsumed into Excise duty and Service Tax be allowed to be used to pay GST?

What is more bothering is the blatant lacunae in the legal provisions and how the draftsmen always get away with it with retrospective amendments.

If the intention was to lapse the balance of credit of EC and SHEC, they could have simply made a rule for that purpose under Section 37 (xviii) of the CE Act in 2015.

If the intention was not to allow transitioning of the balance of credit of such CESSes, the definition of "eligible duties" under Section 140 could have clearly provided for it in the first place, instead of making a retrospective amendment.

Even while making the retrospective amendment they can commit a mistake and include sub-section (1) in Explanation 1 and Explanation 2, which would lead to unintended results and avoid the catastrophe[1] , by not notifying the amendment forever.

While this judgement of the Hon'ble Madras High Court is no doubt, a treatise on interpretation of law, there is no reason for the Government to rejoice about it and what is expected of the Government is to realise the enormous amount of sufferings by the tax paying community as a result of the failure of the Government to make the provisions abundantly clear at the first place and leaving them to judicial interpretation at a later point of time.

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[1]Sub section (1) deals with carrying forward the credit balance in the last return. Explanation 1 refers to sub sections (3), (4) and (6), all of them allow credit in respect of the inputs lying in stock as on 30.06.2017 in different situations. If sub section (1) is included in Explanation 1, the entire balance of credit as per the last return could not be transitioned but only credit to that extent attributable to the stock of inputs lying as on 01.07.2017 could be carried forwarded, which was not the intention. Explanation 2 refers to sub section (5) deals with credit on inputs and input services received on or after 01.07.2017, on which Excise duty or Service Tax as the case may be was paid and if sub-section (1) is also included in Explanation 2, no part of the balance of credit as per last return could be carried forwarded.