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CHARTERED ACCOUNTANTS

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INDIRECT TAX REVIEW
DECEMBER 2015

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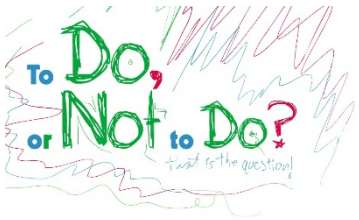
ARTICLES:

Accumulated Education and Higher Education Cess: To be used or not?



Background:

Since the announcement of the exemption being granted to the levy of Education Cess and SHE Cess by the Finance Minister in Budget 2015-16, the issue as regards the utilisation of the accumulated balance of Education Cess and SHE Cess has been a sensational issue and a topic for discussion among the assessees and the consultants. This is also evidenced by a number of articles, write ups, representations being made on this issue. Moreover, recent amendments in the CENVAT Credit Rules, 2004 permitting utilisation of the inputs/capital goods/input services received on or after 01.03.2015/01.06.2015 against payment of excise duty/service tax added a ray of hope that probably the amendment as regards utilisation of accumulated CENVAT credit is on the way. However, the hopes of the assessees were shattered in the Tariff Conference of Central Excise on technical matters organised by the Board on 28th and 29th October, 2015. Recently, CBEC has released the minutes of the meeting for circulation among the departmental officers wherein it has been stated that the utilisation of accumulated balance of education cess is not available for utilisation and shall stand lapse. This article is an attempt to analyse the justification given for denial of utilisation of CENVAT credit balance of education cess and SHE Cess.

Extracts from the Minutes:- As per provisions contained in sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004, it is specified that CENVAT credit of specified duties shall be utilized for payment of those specified duties only. Accordingly, the CENVAT Credit of Education Cess and Secondary & Higher Education Cess can be utilized only for payment of Education Cess and Secondary & Higher Education Cess, respectively. Consequent upon grant of exemption, there is issue of utilization of the accumulated credit of the past. It was suggested that an amendment to sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004 may be made to allow the utilization of balance CENVAT Credit of Education Cess and Secondary & Higher Education Cess towards payment of either duty of Excise or Service Tax.

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

Whether conclusion arrived at justifiable? The outcome of the discussion in meeting was that as the government purposely decided to scrap off the levy of cess in excise and service tax, and since the credit of Education Cess and SHE

cess could be utilised only for payment of Education Cess and SHE Cess respectively; there was no intention to permit utilisation of the accumulated balance of education cess and SHE Cess. The justification given was that since there was no new liability for such cess, the accumulated balance shall lapse. However, the fact that the recent amendments made in the CENVAT Credit Rules, 2004 vide Notification no. 12/2015-C.E. (N.T.) dated 30.04.2015 and Notification no. 22/2015-C.E. (N.T.) dated 29.10.2015 permitting utilisation of the credit of education cess and SHE Cess against payment of excise duty and service tax respectively has not been brought into picture. If at all the government's intention was not to allow the utilisation of the credit of education cess and SHE Cess towards payment of excise duty or service tax, the said amendments would not have been made by them. On the contrary, the reason and justification given in the meeting for restricting the utilisation of the accumulated balance of education cess and SHE Cess appears to be a mere lame excuse.

A look at the judicial pronouncements on the issue:- In this context, we may also refer to the judgment given by the Hon'ble High Court in the case of *Shankeshwar* Fabrics *Private Ltd Vs Union of India [2002 (142) E.L.T. 42 (Raj.)]* wherein it was concluded that the right to Modvat Credit accrues to assessee on the date he pays tax on raw materials or inputs and if the credit has been validly earned, the same cannot be denied to him. This decision was given by placing reliance on the Supreme Court judgment in the case of *Eicher Motors Ltd. Vs Union of India [1999 (106) E.L.T. 3 (S.C.)]* wherein it was held that the modvat credit cannot be declared as lapsed because provision of facility of credit is as good as tax paid till it is adjusted for future liability. It is submitted that although, the minutes of the meeting do not specifically state that the credit balance of education cess would be lapsed but putting restriction as regards utilisation tantamounts to treating the accumulated education cess credit as lapsed because the said credit can be utilised only for payment of education cess itself and not for other duties like excise duty, service tax etc. Accordingly, the conclusion of the meeting renders the analogy of the above cited decision as futile and meaningless. Furthermore, in the opinion of the authors, when the education cess credit for inputs/input services/capital goods received on or after 01.03.2015/01.06.2015 can be permitted for payment of excise duty and service tax, then there should be no embargo in permitting utilisation of accumulated education cess balance. Such a decision indicates adopting two different stands on the same issue as on one hand, the accumulated credit is denied for utilisation on the ground that cess do not exist while on the other hand, for the credit earned after a particular date, the said cess are permitted for utilisation against payment of excise duty and service tax. Such a discriminatory approach is not understandable.

Before parting:- Inspite of repeated representations made by the assessees, there is no clear cut amendment or circular issued with respect to utilisation of the accumulated balance of CENVAT credit of education cess and SHE cess. Furthermore, the above minutes released by CBEC merely represent the view of the departmental officers and cannot be said to have binding effect on the assessees. This is first time that the minutes of a meeting and the discussion thereon is being released by the Board for reference of the departmental

officers but the precedential value of the discussion is highly doubtful. Moreover, if the discussion and conclusion arrived by the departmental officers on technical matters is considered to have binding effect, then what is the significance of Tribunals and Courts established for interpreting the statutory provisions. It is pertinent to note that as far as the accumulated balance of education cess is concerned, the amount would not be substantial in case of individual assessees and so it is not feasible to go in for litigation for such small amounts to the appellate authorities. Furthermore, even monetary limits fixed for admission of appeals would serve as a barrior for the assessees, even if the assessees are willing to litigate the matter. Not only this, if the above conclusion arrived at the meeting is implemented by the field formations, it will only lead to treating the tax paid in the form of cess as cost by the assessees and lead to cascading effect, which is definitely not the intention of the government. Furthermore, this will also lead to doubts raised in the minds of the assessees as regards the fate of their CENVAT balance after implementation of the unified tax reform, GST. This is for the reason that when the government is not willing to permit utilisation of accumulated education cess balance, which is insignificant amount and which is validly earned by them, then there is far possibility that the CENVAT credit balance of service tax, excise duty etc. would be allowed to be utilised post GST tax regime. If the above conclusion reflects the tax policy of the government, the hapless assessees definitely have a strong cause to worry in the near future. Lets hope, the above conclusion of the meeting does not turns into a bitter reality for the assessees!

CENTRAL EXCISE

Case Law

Manufacture

- In Larsen and Toubro Ltd and Ors v CCE (2015-TIOL-2561-CESTAT-MUM), the Mumbai Tribunal held that even putting a tag on parts of automobile parts will amount to labelling of goods and hence will amount to manufacture' under section 2(f)(iii)
- In Bharat Sanchar Nigam Ltd v.CCE&ST (2015-TIOL-2332-CESTAT-EL), the Delhi Tribunal held that the activity of installation and commissioning of switching system along with power plant and inverter did not amount to manufacture.
- In Aravali Marbles v.CCE&ST (2015-TIOL-2321-CESTAT-DEL), the Delhi Tribunal held that cutting of marble blocks into marble slabs did not amount to manufacture

Valuation

- SC overruled the CESTAT Larger Bench decision in Maruti Suzuki case and held that pre-delivery inspection charges and after sales service charges are not to be included in assessable value.

  Commissioner of Central Excise, Mysore Vs. TVS Motors Company Ltd. [2015 (12) TMI 874 – SUPREME COURT]

  Facts:

  TVS Motors Company Ltd. (the Respondent) was holding Central Excise Registration for the manufacturing and clearing two wheeled motor

vehicles. The Respondent sells their goods directly to the customers through sales depots spread throughout the country. The Respondent had requested for provisional assessment to the Department with respect to the depot sales as they could not determine the normal transaction value at the time of clearance at factory gate in respect of such depot clearance. After finalizing the provisional assessment, the Department has passed the Order for inclusion of Pre Delivery Inspection (PDI) charges and Free After Sales service (ASS) charges in the assessable value on the ground of Circular No. 643/34/2002 dated July 1, 2002 wherein it has been clarified that the same has to be included in the assessable value.

Held:

The Hon'ble Supreme Court relying upon the with the view of the Hon'ble Bombay High Court in the case of Tata Motors Ltd. Vs. Union of India [2012-TIOL-721-HC-MUM-CX], held that where the expenses incurred towards PDI and other services are solely borne by the dealer and the manufacturer have nothing to do with the said expenses, then adding those expenses in the assessable value would be contrary to the provisions of Section 4(1)(a) read with Section 4(3)(d) of the Excise Act. Therefore, the amount incurred towards PDI and other services cannot fall within the definition of the transaction value.

Thus, the Hon'ble Apex Court held that PDI charges and free ASS charges would not be included in the assessable value under Section 4 of the Excise Act for the purposes of paying Excise duty. It was further held that the CESTAT Larger Bench view in the case of Maruti Suzuki India Ltd. Vs. Commissioner of Central Excise, Delhi-III [2010 (8) TMI 49-CESTAT NEW DELHI] does not lay down the law correctly and was, therefore, overruled.

- In Aquarius Technologies Pvt Ltd v.CCE (2015-TIOL-2567-CESTAT-MUM), the Mumbai Tribunal held that charges collected towards training provided to the customer's staff, being optional and at the request of customers, was not includible in the assessable value.

CENVAT

- In DCW v.CCE (2015-TIOL-2533-CESTAT-MAD), the Chennai Tribunal held that CENVAT credit was admissible on inputs used for running the Sewage Treatment Plant (STP) since setting up of such STP was a requirement of Pollution Control Board for eradication of water pollution and therefore, it could not be said that STP was not an integral part of the factory as well manufacturing activity.
- In Dalmia Cement (Bharat) Ltd v.CCE (2015-TIOL-2420-CESTAT-MAD), the Chennai Tribunal held that credit was admissible on steel plates/ angles used for fabrication of plant and machinery.
- In JSW Steel Ltd v.CCE (2015-TIOL-2432-CESTAT-MUM), the Mumbai

Tribunal held that demand for reversal of credit under Rule 6(3) was not sustainable when exempted byproducts emerged unintentionally during the manufacture of dutiable final products.

- In Jindal Steel and Power Ltd v.CCE (2015-TIOL-2376-CESTAT-DEL), the Delhi Tribunal held that jumbo electric/ battery operated platform truck, hot metal transport vehicle, trailer assembly and ladle transfer car specially designed for operational use inside the assesse's factory was eligible for credit as capital goods.
- In Jayaswals Neco Ltd v.CCE (2015-TIOL-2388-CESTAT-MUM), the Mumbai Tribunal held that credit on inputs used in export goods could not be denied on the ground that final products was exported directly from the job worker's premises
- In Bhavnish Metal v.CCE (2015-TIOL-2393-CESTAT-DEL), the Delhi Tribunal held that once the recipient had received the goods on payment of duty, the CENVAT credit could not be denied on the ground that the supplier of the inputs was not required to pay excise duty on the goods supplied.

Notifications and Circulars

- The Central Government has issued instruction for withdrawal of appeals pending before Tribunal/ High Court on the basis of earlier Supreme Court's decision on identical matter, which has been accepted by Department.(Instruction No. F. No. 390/Misc./67/2014-JC, dated 18 December, 2015)
- The Central Government has issued instructions in order to reduce Government litigation by providing revised monetary limits as mentioned in the table below, for filing appeals by the department before Tribunal, High Courts and Supreme Court.(Instruction No. F. no.390/Misc./163/2010-JC, dated 17 December, 2015)

S No	Appellate forum	Monetary limit
1	Supreme Court	25,00,000.00
2.	High Court	15,00,000.00
3.	CESTAT	10,00.000.00

Service tax

Case law

- In the case of Goa Mineral Ore Exporter's Association v. Commissioner of Central excise, Goa (2015-TIOL-2670-CESTAT-MUM), the Mumbai Tribunal held that the appellant was an association formed by the members only for the purpose of the mutual benefit of the members in regard to mining/ trade of minerals. There was a mutuality of interest of the members and the association and therefore, the service provider and service recipient concept did not exist in this case. Accordingly, the membership fees collected by the association prior to 1 July, 2012 would not be subject to service tax under the category 'Club or Association services.'

- In the case of Larsen and Toubro Ltd v.Commissioner of Service Tax, Mumbai –II (2015-TIOL-2719-CESTAT-MUM), the Mumbai Tribunal held that recovery of costs for deputation of manpower to its sister concern would not be subject to service tax under the category 'Manpower Recruitment or Supply Agency services'. Further, since no show cause notice was issued to the appellant to tax these services under the category 'Manpower Recruitment and Supply Agency services', the order of the first appellate authority taxing the services under this category was liable to be set aside on this ground itself.
- In the case of Quality Fabricators and Erectors v.The Deputy Director, DGCEI Zonal Unit, Mumbai and Others (2015-TIOL-2710-HC-MUM-ST), the Mumbai High Court held that unless the tax demand was determined pursuant to an adjudication order, recovery proceedings could not be initiated.
- In the case of PR Commissioner of Service Tax, Delhi –II v.Tops Security Limited (2015-TIOL-2751-HC-DEL-ST), the Delhi High Court held that the option to pay the reduced penalty under section 78(1) of the Finance Act, 1994 could not be given to an assessee at the appellate stage i.e. the CESTAT did not have the authority to permit the assessee to pay the reduced penalty under section 78(1). Such option was available to the assessee at the adjudication stage only

VAT/Sales Tax

Notifications and circulars

Delhi

- Due date for filing of information in online Form DP-1 had been extended to 31 December, 2015.(Notification No. F.3(352)/Policy/VAT/ 2013/106273 dated 23 November, 2015)
- Effective from 18 December 2015, 100 % reversal of tax credit was prescribed on un-manufactured tobacco, tobacco and tobacco products in all forms and all kinds of lubricants exported from Delhi other than by way of sale. (Notification No.F.3 (25)/Fin (Rev-I)/2015-2016 dated 18 December, 2015)

Chattisgarh

- Effective 1 December 2015, rate of tax on foreign liquor and Indian-made foreign liquor sold through dealers holding F.L-10 license has been increased from 7% to 8.5%. (Notification No. F1035/2015/CT/V (68) dated 30 November, 2015)

Madhya Pradesh

- Due date for submission of revised return pertaining to FY 15 for dealers having annual turnover exceeding INR 10 million was extended to 31 December, 2015. (Notification No. FA3632015IV (39) dated 9 December, 2015)

- Due date for submission of audit report for FY 15 was extended to 31 December, 2015.(Notification No. FA3632015IV (40) dated 9 December, 2015)
- The VAT rate on the following products was increased from 14%. The revised rates (given below) have been made effective from 18 December, 2015:(Notification No. A-3-58/2015/1/Five (44) dated 17 December, 2015

S No	Description of goods	VAT rate
1.	Cigarettes	16%
2.	All kinds of non-alcoholic drinks and beverages	20%
3.	All types of two/three wheelers and four wheeler motor vehicles	15%
4.	Refrigerator, deep freezer, air - Conditioning plants	15%
5.	Television	15%

Chandigarh

- Effective 11 December 2015, rate of tax on normal petrol and branded premium petrol has been increased to 24.74%. The rate of tax on automobiles has been increased to 13.20%. Due date for filing reconciliation return for FY 15 in Form 9 has been extended to 15 December, 2015.(Notification No. E&T-ETO (Ref.)-2015/3646 dated 11 December, 2015)

Punjab

- Effective 2 December 2015, rate of tax on 'dry fruits' has been decreased from 6.05% to 4.95%.(Notification No. S.O.57/P.A.8/2005/S.8/2015 dated 2 December, 2015)

Tamil Nadu

- Facility for issue of manual forms of "C" and "F" to the dealers for all missed out invoices and mistakes in the already generated online forms, has been extended up to 31 March, 2016.(Circular No.45/2015 C4/678/2012 dated 10 December, 2015)

Telangana

- Effective 1 February 2016, issue of e-waybills has been made mandatory.(Circular CCT's Ref No. Enft./D2/172/2010 dated 1 December, 2015)
- Effective 15 December 2015, the time limit of granting refund of tax claimed by the dealer has been reduced from 90 days to 60 days.(Notification No. G. O. MS No. 235 dated 10 December, 2015)

Uttarakhand

- Effective 5 December 2015, rate of tax on 'Diesel' has been changed from 21% to 21% or INR 9 per/lit whichever is higher.(Notification No. 885/2015/146(120)/XXVII (8)/2008 dated 5 December, 2015)

Case Law

- In Samsung India Electronics Pvt. Ltd. v.State of Punjab and Another [2015-TIOL-2720-HC-P&H-VAT], the Punjab High Court, relying upon the decision of the Supreme Court in the case of State of Punjab and others v.Nokia India Private Ltd, held that the mobile battery charger was not a part of mobile phone but an accessory and accordingly the same would be taxed at the rate applicable on accessories of mobile phones.
- In Citi Bank v.Commissioner of Sales tax [2015-TIOL-2842-HC-DEL-CT], the Delhi High Court held that the sale of repossessed cars by the bank through auction in order to realise its dues, was incidental or ancillary to its main banking business and qualifies as “Business” under Delhi Sales Tax Act. Therefore, the same was liable to sales tax

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