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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) NO. 7837/2016**

Reserved on : 3rd January, 2018
Date of decision: 15th February, 2018

**CELLULAR OPERATORS ASSOCIATION OF INDIA AND
OTHERS**

..... Petitioners

Through Mr. S.K. Bagaria, Sr. Advocate with Ms.
Manya Bhardwaj, Mr. Abhinav Agrawal, Ms.
Gunika Gupta and Mr. Ajeet Singh, Advocates.
versus

UNION OF INDIA AND ANOTHER

..... Respondents

Through Ms. Suparna Srivastava, CGSC & Mr.
Tushar Mathur, Advocate for UOI.
Mr. Sameer Jain, Jr. Standing Counsel for
respondent No. 2-CBEC.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.:

Cellular Operators Association of India, a society registered under the Societies Registration Act, and nine others, have filed the present writ petition for quashing of Notification No. 22/2015-CE(NT) dated 29th October, 2015 as violating Articles 14, 19(1)(g), 265 and 300A of the Constitution of India, and for direction that the credit accumulated on

account of Education Cess (EC, for short) and Secondary and Higher Education Cess (SHE, for short) should be allowed to be utilised for payment of service tax leviable and payable on telecommunication services.

2. Finance (No. 2) Act, 2004 had introduced levy of EC on excisable goods and taxable services. SHE on excisable goods and taxable services was imposed vide Finance Act, 2007.

3. Under the CENVAT Credit Rules, 2004 (CCR, for short), credit of EC and SHE was admissible and could be utilised for payment of EC and SHE respectively. In other words, CENVAT credit on EC and SHE on inputs, capital goods and input services could be utilised and availed of for payment of EC and SHE on manufactured goods and output services. Input EC and SHE credit had the effect of preventing cascading effect on EC and SHE payable down the line. It is an accepted and admitted case that benefit of EC and SHE on inputs, etc. could not have been utilised for payment of excise duty service tax on the output, i.e., manufactured goods or taxable services. Thus, cross utilisation of EC and SHE towards excise duty or service tax was impermissible and not permitted.

4. EC and SHE were abolished and were not payable on excisable goods with effect from 1st March, 2015 vide Notification Nos. 14/2015-CE and

15/2015-CE both dated 1st March, 2015. EC and SHE were also abolished and ceased to be payable on taxable services when Section 95 of Finance Act (No. 2) 2004 and Section 140 of Finance Act, 2007 were omitted by Finance Act, 2015. The omission was to take effect from 1st June, 2015 vide Notification No.14/2015-ST dated 19th May, 2015. As a result, levy of EC and SHE on excisable goods was withdrawn with effect from 1st March, 2015 and in respect of taxable services with effect from 1st June, 2015. The petitioners do not have any grievance against the withdrawal or abolition of levy of EC and SHE.

5. The grievance of the petitioners is, and they 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 is 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, which reads:-

“11.8. 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..... It is proposed to increase the present rate of Service Tax plus education cesses from 12.36% to a consolidated rate of 14%.”

Education Cess and Secondary & Higher Education Cess leviable on excisable goods are being subsumed in Basic Excise duty. Consequently, ... The standard ad valorem rate of Basic Excise Duty is being increased from 12% to 12.5% and specific rates of Basic Excise Duty on petrol, diesel, cement, cigarettes & other tobacco products (other than biris) are being suitably changed....

the Service Tax rate is being increased from 12% plus Education Cesses to 14%. The ‘Education Cess’ and ‘Secondary and Higher Education Cess’ shall be subsumed in the revised rate of Service Tax. Thus, effective increase in Service Tax rate will be from existing rate of 12.36% (inclusive of cesses) to 14%. The new Service Tax rate shall come into effect from a date to be notified by the Central Government after the enactment of the Finance Bill, 2015. Till the time the revised rate comes into effect, the levy of ‘Education cess’ and ‘Secondary and Higher Education cess’ shall continue to be levied in Service Tax”.

Reference is also made to the Explanation given by the Joint Secretary, Tax Research Unit, Ministry of Finance, Government of India, vide letter F.No.334/5/2015-TRU dated 28th February, 2015, which reads:-

“The rate of Service Tax is being increased from 12% plus Education Cesses to 14%. The ‘Education Cess’ and ‘Secondary and Higher Education Cess’ shall be subsumed in the revised rate of Service Tax. Thus, the effective increase in Service Tax rate will be from the existing increase in Service Tax rate will be from the existing rate of 12.36% (inclusive of cesses) to 14%, subsuming the cesses”

The contention is that EC and SHE, which were earlier imposed and then withdrawn from 1st March, 2015 and 1st June 2015 for excisable goods and taxable services respectively, had been subsumed and included in the excise duty and service tax, and therefore, the amount lying in the credit towards EC and SHE should be available for availing CENVAT credit. This was not a case of abolition of EC and SHE, but the cesses were added and became part of the excise duty or service tax. Reliance is placed on the dictionary definition of the term “subsumed”, which means to include, absorb in something else or incorporated into something larger or more general. Therefore under law, unutilised EC and SHE should be allowed to be utilised for payment of basic excise duty in excisable goods and service tax on taxable service, for otherwise the action would be clearly arbitrary, capricious and tantamount to lapsing of credit accrued on the input, though higher excise duty or service tax was payable on the output. The petitioners, it is asserted, have a vested right to claim benefit of utilization of the

unutilized credit. Reliance is placed upon the judgment of the Supreme Court in *Eicher Motors Limited and Another versus Union of India and Others*, (1999) 2 SCC 361 and *Samtel India Limited versus Commissioner of Central Excise, Jaipur*, (2003) 11 SCC 324.

6. The petitioners have pointed out that the issue with regard to utilisation of accumulated credit of EC and SHE as on 1st March, 2015 for excisable goods and 1st June, 2015 for taxable services was considered in the Tariff Conference held on 28th and 29th October, 2015 and post the said conference, Central Board of Excise and Customs had issued instructions vide letter No. 96/85/2015-CX.I dated 7th December, 2015 stating, inter alia,:-

“B.21 – ‘Hyderabad, Coimbatore, Vadodara, Vishakhapatnam, Delhi Zone-Cenvat Credit – Balance of Education Cess and Secondary & Higher Education Cess lying in the CENVAT Credit Account:

Issue:

Exemption from levy of Education Cess and Secondary & Higher Education Cess has been provided w.e.f. 01.03.2015 vide notification no. 14/2015-CE & 15/2015-CE both dated 01.03.2015, Sub-rule 7(b) of Rule 3 of CENVAT Credit Rules, 2004, specifies that CENVAT credit of specified duties shall be utilized for payment of those specified duties only. 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 is 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.

Discussion & Decision

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."

It is submitted that the aforesaid reasoning is fallacious and contrary to law in view of the admission that EC and SHE were subsumed in the increased or higher excise duty and service tax rates applicable, which coincide with the withdrawal of EC and SHE.

7. In support of the said contention, reference was made by the petitioners to the amended CC Rules, i.e., CENVAT Credit Rules, 2004,

which partially permit utilization of EC and SHE by adding six provisos in Rule 3, sub-rule (7) in clause (b), which reads as under:-

“Cenvat Credit Rules, 2004-Second Amendment of 2015

In exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 (1 of 1944) and Section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the CENVAT Credit Rules, 2004, namely:-

1. (1) These rules may be called the CENVAT Credit (Second Amendment) Rules, 2015.

(2) They shall come into force from the date of their publication in the Official Gazette.

2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 3, in sub-rule (7), in clause (b), after the second proviso, the following shall be substituted, namely:-

“Provided also that 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 product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act:

Provided also that the credit of balance fifty per cent Education Cess and Secondary and Higher Education Cess paid on capital goods received in the factory of manufacture of final product in the financial year 2014-15 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act:

Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on input services received by the manufacturer of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise specified in the First Schedule to the Excise Tariff Act.”

“Cenvat Credit Rules, 2004-Fifth Amendment of 2015

In exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 (1 of 1944) and Section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules further to amend the CENVAT Credit Rules, 2004, namely:-

1. (1) These rules may be called the CENVAT Credit (Fifth Amendment) Rules, 2015.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 3, in sub-rule (7), in clause (b), after the fifth proviso, the following proviso shall be inserted, namely:-

“Provided also that the credit 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:

Provided also that the credit of balance fifty per cent 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:

Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on input service in respect of which the invoice, challan or Service Tax Certificate for Transportation of Goods by Rail (referred to in rule 9), as the case may be, 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.”

It is accordingly submitted that the respondents themselves in some cases have permitted credit of EC and SHE and utilization of accumulated credit for payment of excise duty and service tax.

8. The respondents have contested the petition on several grounds and, *inter alia*, asserted that credit of EC and SHE towards payment of excise duty or service tax is not a vested right. The effect of the legislation withdrawing EC and SHE was to abolish the cess, though while presenting the Bill, etc. and giving reasons for increase in the excise duty and service tax, it was stated that EC and SHE would not be henceforth levied and would get subsumed in the higher rate of tax. Cross-utilization of EC and SHE credit was never permitted and allowed under the earlier provisions. The two notifications incorporating provisos (3) to (8) to Rule 3, sub-rule (7) in clause (b) have a very limited application as they apply to cases of excise duty where capital goods or inputs or input services on which EC and SHE

had been paid were received by the purchaser/manufacturer of the final product on or after 1st day of March, 2015 or were manufactured after 1st day of March, 2015. In case of service tax, credit of EC and SHE was given where inputs or capital goods were received by the provider of output services on or after 1st day of June, 2015 or where credit of EC and SHE paid on input service in respect of invoice, bill, challan or service tax certificate or transportation of goods by levy was received by the provider of output service on or after 1st day of June, 2015. Credit of balance fifty percent of EC and SHE paid on capital goods received in the factory of a manufacturer of final product in the financial year 2014-15 for payment of excise duty and service tax was also provided. These, as elucidated and explained, were new benefits and concessions granted, as cross utilization was earlier not permitted and allowed. Any new concession or benefit given, would not in law on stand-alone basis, confer a legal right to claim vested right to a concession or benefit which has not been granted. Of course, this amended provisions can be relied as a secondary fact to support the main argument that EC and SHE were subsumed.

9. The first aspect to be examined is the statutory effect of withdrawal of EC and SHE on excisable goods and taxable services with effect from 1st

March, 2015 and 1st June, 2015 respectively, pursuant to the Finance Act, 2015. By Notification No. 14/2015-CE dated 1st March, 2015, the Central Government in public interest had granted exemption to all goods falling in the First Schedule of the Central Excise Tariff Act, 1885 from whole of EC leviable thereon under Section 93 of the Finance (No.2) Act, 2004. Similarly, vide Notification No.15/2015-CE dated 1st March, 2015, the Central Government in public interest had exempted all goods falling in the First Schedule of the Central Excise Tariff Act, 1985 from whole of SHE leviable under Section 138 of the Finance Act, 2007. In respect of taxable services, the Finance Act, 2015 had omitted Section 95 of the Finance (No. 2) Act, 2004, which imposed EC on taxable services, vide Section 153 and Section 140 of Finance Act, 2007 and SHE on taxable services vide Section 159, with effect from the date as notified by the Central Government in the Official Gazette. These exemptions and omissions were given effect from 1st March, 2015 for excisable goods and 1st June, 2015 for taxable services, as mentioned earlier.

10. Omission of a provision signifies deletion of that provision and is normally not treated as different from repeal. The repeal/omission in the present case was not made retrospectively, but applied prospectively.

Manufacturers and output service providers were entitled to take benefit of EC and SHE credit on the EC and SHE payable on manufactured goods and output services on or before the cut off date, i.e., 1st March, 2015 in case of manufactured goods and 1st June, 2015 in case of taxable services. They have not been allowed to take credit after the said two dates for the simple reason that EC and SHE ceased to be applicable and were no longer payable after the said dates. The provisos added to Rule 3, sub-rule (7) in clause (b) are really in the nature of concessions confined to a limited and narrow set of cases and are not of general application. Noticeably, they expand the scope and give benefit of utilization of accumulated EC and SHE against payment of excise duty and service tax, which was not the position prior to 1st March, 2015 and 1st June, 2015, respectively. It is also easily apparent as to why the said benefit or concession was granted. These cases certainly fall in a distinct and separate class. The said classification would not fall foul of vice of discrimination. Article 14 is not offended. In fact the petitioners do not challenge and question the provisos, *albeit* seek additional benefit and concession beyond those granted, even though they were never available earlier.

11. It is in the aforesaid context and background that the petitioners have harped and heavily relied upon the word “subsumed” used in the speech of the Finance Minister while presenting the Budget Speech, as also in the explanation memorandum to the Finance Bill, 2015 and the TRU letter. It would not be correct to understand and interpret the word “subsumed” used as asserted by the petitioners. A Finance Bill or a Budget has financial and tax implications. It is an economic, political and policy statement. Interplay of politics and economics gets reflected in the statement made and relied. Raising or increasing taxes often meets resistance, and on most occasions has to be justified and explained. The statements and explanations given in the present context would show that the Government had decided to increase excise duty and service tax marginally and at the same time had decided to withdraw or abolish EC and SHE. Any exercise of increasing taxes and withdrawing a cess or a tax is undertaken keeping in mind several aspects. This can include revenue collection in the form of increased taxes on one hand, and withdrawal or reduction of cess or another tax so as to curtail the adverse impact due to increase. Budgets do, and are, a balancing exercise. We would not read and hold that EC and SHE for excisable goods and taxable services had continued and were applicable even after 1st March,

2015 or 1st June, 2015 respectively, in the manner that they got included in, and formed a part of, the higher tax rate applicable to excise duty and service tax. Noticeably, the service tax rate had gone up by 2%, from 12% to 14%, with the intent to increase it further in view of implementation of the General Goods and Services Tax in future. In the case of excise duty, the increase was only marginal, from 12% to 12.50%. Pertinently, no statement or assertion was made that the benefit of unutilized EC and SHE credit would be given against excise duty and service tax. The use of the words “subsumed” with reference to the two cesses could well indicate that there would not be an increased tax burden being put on the payers or the consumers, as EC and SHE were being withdrawn. Noticeably, the two cesses and the excise duty and the service tax were always treated as different and separate and cross-utilization was never permitted.

12. It is no doubt true that the two cesses, in the present case, were in the nature of taxes and not fee, but it would be incorrect and improper to treat the two cesses as excise duty or service tax. They were specific cesses for the objective and purpose specified. A Constitution Bench of five Judges in ***Hingir-Rampur Coal Company Limited and Others versus State of Orissa and Others***, (1961) 2 SCR 537 had elucidated that a cess can be in the form

of a tax or a fee, though both are compulsory extraction of money. In case of a fee, there is an element of *quid pro quo*, while in tax this is not required, even if the tax being collected is used to constitute a specific fund, which does not become part of the Consolidated Fund, and its application can be regulated and confined to its purpose.

13. More relevant and important for the present context and issue would be the judgment of the Supreme Court in ***B.K. Industries and Others versus Union of India and Others***, 1993 Supp (3) SCC 621, wherein validity of levy of cess under Vegetable Oil Cess Act, 1983 was challenged. The cess was levied for the purpose of National Oil-seeds and Vegetable Oils Development Board Act, 1983 and was in addition to excise duty leviable under the Central Excise Act or law for the time being in force. In the Budget Speech delivered on 28th February, 1986 for the year 1986-87, it was decided to dispense with the cess on vegetable oil. It was also stated in the Budget Speech that cess collected since 1st April, 1986 would be refunded. However, the cess was withdrawn vide repeal Act, effective from 1st April, 1987. Relying upon the aforesaid speech on the Floor of the House, the submission was that the statement made constitutes an enforceable right and vegetable oil cess paid between 1st March, 1986 and 31st March, 1987, when

the repeal Act was made effective, should be refunded. Plea of enforceable right was rejected in the following words:-

“9. We find it difficult to agree. It is not brought to our notice that the budget proposals contained in the Finance Minister's speech were accepted by the Parliament. The cess having been imposed by a Parliamentary enactment could be rendered inoperative only by a Parliamentary enactment. Such repealing enactment came only in the year 1987 with effect from April 1, 1987. Not only that. The repealing Act expressly provided in Section 13 that the cess due before the date of said repeal, but not collected, shall be collected according to law as if the Cess Act is not repealed. This provision amounts to a positive affirmation of the intention of the Parliament to keep the said imposition alive and effective till the date of the repeal of the Cess Act. In the face of the said statutory provisions, no rights can be founded — nor can the levy of the cess be said to have been dispensed with — by virtue of the alleged decision referred to in the Finance Minister's speech or on account of the letter dated August 11, 1986. The Finance Minister's speech is not law. The Parliament may or may not accept his proposal. Indeed, in this case, it did not accept the said proposal immediately but only a year later. It is only from the date of the repeal that the said levy becomes inoperative.”

We did not go as far in the present case for the explanation and reasons elucidated and given in paragraph 11 above. Use of the word "subsumed" in the context of the present case does not help and assist the petitioners in the manner asserted. No promise and statement that cross utilization of EC and

SHE would be permitted was made. The petitioners seek an addition and expansion to what was stated and intended.

14. In *Shashikant Laxman Kale and Another versus Union of India and Another*, (1990) 4 SCC 366, constitutional validity of clause (10-C) of Section 10 of the Income Tax Act was challenged, as benefit under the said Section was not available to employees of private sector on voluntary retirement. Reliance was placed upon the Explanatory notes appended to the Statement of Objects and Reasons of the Bill. The Supreme Court held that the petitioner therein could not draw support from the heading in the explanatory note and explanatory memorandum would usually not be an accurate guide of the final enactment. Distinction was drawn between purpose and object of a legislation and the legislative intention, which was significant, and it was emphasized that usually it was not permissible to use these external aids, yet it was permissible to look into historical facts and surrounding circumstances for ascertaining the evil sought to be remedied. The Court, while examining the latter aspect, can look into the entire gamut of material for determining the purpose and object of the legislation. It need not be restricted to the explanatory memorandum. Thus, it is permissible to look into the object and reasons of the bill for the limited purpose of

appreciating the background and antecedent factual matrix leading to the legislation, not as the sole material, but with other material and external aids.

Significantly, it was observed:-

“23. A catch phrase possibly used as a populist measure to describe some provisions in the Finance Bill in the explanatory memorandum while introducing the Bill in the Parliament can neither be determinative of, nor can it camouflage the true object of the legislation. It is not unlikely that the phrase ‘welfare measures’ was used to emphasise more on the effect of the provisions thereunder on the tax payer for populism.”

15. In *Tarlochan Singh Flora versus Wakom (Heathrow) Ltd.*, [2006] EWCA Civ 1103, Brooke LJ, succinctly elucidated the legal position regarding explanatory notes after referring to the earlier case law as under :-

The use that courts may make of explanatory notes as an aid to construction was explained by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 , paras 2–6; see also *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196 , para 4. As Lord Steyn says in the National Asylum Support Service case, explanatory notes accompany a Bill on introduction and are updated in the light of changes to the Bill made in the parliamentary process. They are prepared by the government department responsible for the legislation. They do not form part of the Bill, are not endorsed by Parliament and

cannot be amended by Parliament. They are intended to be neutral in political tone; they aim to explain the effect of the text and not to justify it.

The text of an Act does not have to be ambiguous before a court may be permitted to take into account explanatory notes in order to understand the contextual scene in which the Act is set: see the National Asylum Support Service case, para 5. In so far as this material casts light on the objective setting or contextual scene of the statute, and the mischief to which it is aimed, it is always an admissible aid to construction. Lord Steyn, however, ended his exposition of the value of explanatory notes as an aid to construction by saying [2002] 1 WLR 2956 , para 6:

“What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in explanatory notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.”

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 assesseees. 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

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* (1999) 2 SCC 361 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 the 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.

9. Without such a challenge, the appellants want us to interpret the Rule to mean that the Rule in question is not applicable in regard to credits acquired by a manufacturer prior to the coming into force of the Rule. This we find difficult because in our opinion the language of the proviso concerned is unambiguous. It specifically states that a manufacturer cannot take credit after six months from the date of issue of any of the documents specified in the first proviso to the said sub-rule. A plain reading of this sub-rule clearly shows that it applies to those cases where a manufacturer is seeking to take the credit after the introduction of the Rule and to cases where the manufacturer is seeking to do so after a period of six months from the date when the manufacturer received the inputs. This sub-rule (*sic* proviso) does not operate retrospectively in the sense it does not cancel the credits nor does it in any manner affect the rights of those persons who have already taken the credit before coming into force of the Rule in question. It operates prospectively in regard to those manufacturers who seek to take credit after the coming into force of this Rule. Therefore, in our opinion, the Tribunal was justified in holding that the Rule in question only restricts the right of a manufacturer to take the credit beyond the stipulated period of six months under the Rule. Therefore, this appeal will have to fail."

This decision, and the distinction drawn, supports the observations recorded hereinabove by us in the present case.

18. For the aforesaid reasons, we do not find any merit in the present writ petition and the same is dismissed. However, in the facts of the case, there would not be any order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

FEBRUARY 15, 2018
VKR

न्यायमेव जयते