2024:KER:66766

'C.R'

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

TUESDAY, THE 3RD DAY OF SEPTEMBER 2024 / 12TH BHADRA, 1946

WP(C) NO. 28282 OF 2022

PETITIONER:

M/S.MUTHOOT FINANCE LIMITED,
2ND FLOOR, MUTHOOT CHAMBERS,
OPP. SARITHA THEATRE COMPLEX, BANERJI ROAD,
KOCHI – 682 018,
REPRESENTED BY MANOJ JACOB
CHIEF GENERAL MANAGER - ACCOUNTS & TAXATION.

BY ADVS.
JAZIL DEV FERDINANTO
JOSE JACOB

RESPONDENTS:

1. **UNION OF INDIA,**
REPRESENTED BY SECRETARY, MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE, NORTH BLOCK,
NEW DELHI – 110 001.

2. **ASSISTANT COMMISSIONER,**
OFFICE OF THE ASSISTANT COMMISSIONER,
4TH FLOOR, CENTRAL EXCISE BHAVAN
CENTRAL TAX AND CENTRAL EXCISE,
ERNAKULAM DIVISION,
KATHRIKADAV, KERALA – 682 017.

BY ADVS.
SREELAL N. WARRIER, SC, CENTRAL BOARD OF EXCISE
SHRI.P.R.SREEJITH, SC, GSTN
SRI.T.C.KRISHNA FOR UNION OF INDIA

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 03.09.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R'

JUDGMENT

The petitioner is a Public Limited Company incorporated under the provisions of the Companies Act, 1956. It is engaged in financing, providing personal and business loans upon the security of gold. For the period from April 2017 to June 2017, the petitioner had filed returns under the provisions of the Finance Act, 1994 disclosing payment of Service Tax of Rs.10,36,39,987/- Education Cess (EC) amounting to Rs.67,69,195/-, Secondary and Higher Education Cess (SHEC) amounting to Rs.35,18,566/- and Krishi Kalyan Cess (KKC) amounting to Rs.54,65,526/-.

2. Following the 101st amendment to the Constitution and the introduction of GST, the petitioner was under the impression that unutilized credit on account of payment of Service Tax including amounts paid towards EC, SHEC and KKC could be transitioned to the GST regime. According to the petitioner, the provisions of Section 140(8) of the CGST Act permitted

such transition. However, vide the CGST (Amendment) Act 2018 introduced with retrospective effect from 01.07.2017, Section 140(1) of the CGST Act was amended to replace the term '*CENVAT credit*' with the term '*CENVAT credit of eligible duties*'. This was to prevent the transition of accumulated credit on account of payment of various amounts as Cess to the GST. It is the case of the petitioner that the said amendment was notified vide notification No.2/2019-Central Tax dated 29.01.2019. It is the case of the petitioner that in the case of ***Assistant Commissioner of CGST and Central Excise and Others v. Sutherland Global Services Private Limited and Others; 2020 SCC OnLine Mad 27359***, the Madras High Court took the view that Cess such as EC, SHEC and KKC could not be transitioned with reference to the provisions of Section 140 of the CGST Act. According to the petitioner, it accordingly reversed the transitional credit claimed on account of payment of EC, SHEC and KKC and on such reversal, the petitioner became entitled to seek a refund in terms of the

provisions contained in Section 142(3) of the CGST/SGST Acts under the existing law (Finance Act, 1994) and therefore, the petitioner filed a claim for refund of an amount of Rs.1,57,53,287/-. The said application which, is on record as Ext.P4 was rejected finding that the claim was time-barred in terms of the provisions contained in Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax by virtue of the provisions contained in the Finance Act, 1994. The order of the competent authority (respondent No.2) rejecting the refund claimed as time-barred is on record as Ext.P8. In the meanwhile, the petitioner had also filed an application for refund under Section 54 of the CGST Act clearly stating that the same needs to be processed only if Ext.P4 application is rejected by the competent authority.

3. Sri. Jose Jacob, the learned counsel appearing for the petitioner vehemently contends that the rejection of the application for refund filed by the petitioner in terms of the provisions contained in Section 142 (3) of the CGST Act as time-barred is clearly unsustainable in law.

It is submitted that going by the provisions as they stood at the time of the introduction of GST, the petitioner was entitled to transitional credit available on account of payment of EC, SHEC and KKC and it is only with the retrospective amendment of Section 140 of the CGST/SGST Acts that such transition became impossible. It is submitted that the application for refund in terms of the provisions contained in sub-section(3) of Section 142 of the CGST Act should therefore be considered with reference to the date on which the amendment came into force. Further, it is submitted that it is only on reversal of the transitional credit claimed that the petitioner could maintain an application for refund in terms of the provisions contained in Section 11B of the Central Excise Act, 1944 as made applicable to Service Tax. It is submitted that in such circumstances, the dismissal of the application for refund as time-barred is clearly illegal and unsustainable in law. The learned counsel appearing for the petitioner would submit that there are several judgments of the Tribunal holding in similar

circumstances that the assessee is entitled to a refund of EC, SHEC and KKC on account of the fact that they could not be transitioned in terms of the provisions contained in Section 140 of the CGST Act. It is submitted that if the amount could not be sanctioned as a refund under the provisions of the Finance Act, 1994 read with the applicable provisions of the Central Excise Act, 1944, the petitioner was entitled to maintain an application for refund in terms of the provisions contained in Section 54 of the CGST Act. It is submitted that Ext.P5 application filed by the petitioner has also not been considered by the competent authority. It is therefore submitted that Ext.P8 order may be set aside and the matter may be remanded for consideration on merits by the competent authority or it may be held that the petitioner can process its application for refund (Ext.P5) in accordance with the provisions contained in Section 54 of the CGST Act.

4. Sri. P.R. Sreejith, learned counsel appearing for the respondent Department would submit that the petitioner is clearly not entitled to the benefit of refund of

transitioning the amounts paid as EC, SHEC and KKC in terms of the provisions contained in the CENVAT Credit Rules, 2004 (hereinafter referred to as ‘the CENVAT Rules’). It is submitted that the EC, SHEC and KKC could be set off in terms of the provisions contained in the CENVAT Rules only against payment of similar Cess. It is pointed out that the EC and SHEC were abolished on 01.03.2015 and 01.06.2015 respectively. It is submitted that the provisions for collecting KKC continued till the introduction of GST and were abolished with effect from the coming into force of the Taxation Law (Amendment) Act 2017. It is submitted that when amounts paid as EC, SHEC and KKC could be utilized only for setting off payments to be made against such Cess, the petitioner had no right to maintain any application for refund of the unutilized portion of credit available on account of payment of EC, SHEC and KKC. It is submitted that the issue raised by the petitioner is squarely covered against the petitioner in view of the judgment of the Division Bench of the Madras High Court in ***Sutherland Global***

Services Private Limited (supra). It is pointed out that Section 54(3) of the CGST Act clearly indicates that a refund (in cash) under GST is available only in two circumstances, i.e, (i) when the applicant makes a zero-rated supply and (ii) where the refund arises on account of an inverted duty structure (inverted duty structure is a situation where the duty paid on inputs is higher than the duty to be paid on outputs). It is submitted that the claim of the petitioner for refund was clearly not maintainable and it is also a time-barred one. It is submitted that the Court does not issue futile writs and unless this Court were to find any right on the petitioner to claim a refund under the provisions of the Service Tax Act, 1994 read with the relevant provisions of the Central Excise Act 1944, there is no question of this Court directing the application of the petitioner to be considered on merits even if this Court were to find that the rejection of the application on the ground of it being time-barred is not sustainable in law.

5. Having heard the learned counsel appearing for the petitioner and the learned Standing Counsel appearing for the respondents, I am of the view that the petitioner has not made out any case for the grant of any of the reliefs sought in the writ petition. A reading of the provisions of the CENVAT Rules indicates that the EC, SHEC and KKC can be utilized only for payment of such Cess and not for any other purposes (See the First and Second provisos to Rule 3(7)(b) & Rule 3(7)(d) of the CENVAT Credit Rules, 2004). It is clear that there is no cross-utilization of EC, SHEC and KKC against tax payable on account of Service Tax under the provisions of the Finance Act, of 1994. It is evident from the judgment of the Division Bench of the Madras High Court in ***Sutherland Global Services Private Limited (supra)*** that there cannot be any transitioning of Cess paid as EC, SHEC and KKC under the provisions of Section 140 of the CGST Act. The following observations of the Madras

High Court are relevant in this regard:-

> *"37. But, as noted above, the imposition or levy of Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess did not operate after 01.07.2017. Explanation 3, in our opinion, specifying that any kind of Cess will be excluded for the purpose of Section 140, makes the intention of the Legislature very clear and Sub-section (8) of Section 140, which was emphasized by the learned counsel for the Assessee before us, is not excluded from the effect and operation of Explanation 3, because the exclusion is of any Cess which has not been specified in Explanations 1 and 2, Education Cess and Secondary and Higher Education Cess and Krishi Kalyan Cess are not included in Explanations 1 and 2 at all. Therefore, the exclusion of Education Cess and Secondary and Higher Education Cess for the purpose of carry forward and set off under Section 140 is specifically provided in Explanation 3, which is clearly applicable to gather the legislative intent, irrespective of piecemeal enforcement of Explanations 1 and 2 by the Legislature. Explanation 3 has its own force and application*

and does not have a limited application only via the route of Explanation 1 and Explanation 2. The Departmental Circular dated 02.01.2019, quoted above, in our opinion, rightly clarified this position with reference to Explanation 3 to Section 140 of the Act

39...........The "taking" of the input credit in respect of Education Cess and Secondary and Higher Education Cess in the Electronic Ledger after 2015, after the levy of Cess itself ceased and stopped, does not even permit it to be called an input CENVAT Credit and therefore, mere such accounting entry will not give any vested right to the Assessee to claim such transition and set off against such Output GST Liability."

I am in respectful agreement with the view taken by the Division Bench of the Madras High Court in ***Sutherland Global Services Private Limited (supra).*** Therefore, the question of transitioning the EC, SHEC and KKC Credit does not arise for consideration. To be fair to the petitioner, the petitioner has no case that such transitioning is permissible. Coming to the claim of the

petitioner for refund, it is to be noted that the EC and SHEC were abolished with effect from 01.03.2015 and 01.06.2015 respectively. With the abolition of such Cess and the provisions of the CENVAT Rules providing that credit of such Cess can be utilised only for payment of the same Cess, the question of permitting the petitioner to utilize the credit does not arise for consideration. It is clear from the judgment of the Supreme Court in ***Union of India and Others v. VKC Footsteps India Private Limited; (2022) 2 SCC 603*** that, a right to refund can be circumscribed by statutory provisions and in the absence of any provision enabling the petitioner to claim the refund of amounts paid as EC, SHEC and KKC (to the extent unutilised) the question of entertaining a claim for refund in the nature of Ext.P4 does not arise for consideration.

6. Coming to the claim of the petitioner that it is entitled to entertain a claim for refund under the provisions of Section 54 of the CGST Act, I am of the view

that the said contention cannot be accepted in the light of clear provisions contained in Sub-Section (3) of Section 54 of the CGST Act. It is clear from a reading of Sub-Section (3) of Section 54 of the CGST Act that a claim for refund of the CGST/SGST/IGST (in cash) can be entertained only in two circumstances. The first is where there is a zero-rated supply of goods or services and the second one is, where the refund application arises on account of an inverted duty structure, i.e where the duty to be paid or paid on output services or goods is less than the duty paid on input services or input goods. That apart, the question of entertaining any application for a refund under the provisions of Section 54 of the CGST Act does not arise in the case of the petitioner. As held in ***Sutherland Global Services Private Limited (supra)*** there was no provision enabling the petitioner to claim the transition of EC, SHEC and KKC to the GST regime and the question of entertaining any application for a refund under the provisions of Section 54 of the CGST Act does not arise.

7. The contention of the learned counsel appearing for the petitioner that various Tribunals had taken a view contrary to the view taken by this Court and has held that EC, SHEC and KKC paid at the relevant time under the provisions of the Finance Act 1994 can be refunded cannot be accepted. In view of the statutory provisions discussed above, the view taken by various Tribunals does not appear to be in accordance with the statutory provisions.

8. At this stage, the learned counsel appearing for the petitioner vehemently contends that the application filed for refund under Section 54 of the CGST Act should have been considered and a speaking order should have been passed by the competent authority. It is pointed out that Ext.P5 remains unattended and no order has been passed by the competent authority till today. In light of the view that I have taken of the statutory provisions and since the petitioner is not entitled to transition of amounts paid as EC, SHEC and KKC to the GST regime,

the question of directing the authority to consider and pass orders on Ext.P5 also does not arise for consideration. It is settled law that the Court will not issue futile writs.

In that view of the matter, I find no merit in any of the contentions of the learned counsel appearing for the petitioner. The writ petition fails and it is accordingly dismissed.

Sd/-
GOPINATH P.
JUDGE

ajt/DK

APPENDIX OF WP(C) 28282/2022

PETITIONER EXHIBITS

Exhibit -P1	**TRUE COPY OF THE SERVICE TAX RETURN FILED FOR THE PERIOD FROM APRIL 2017 TO JUNE 2017**
Exhibit -P2	**TRUE COPY OF THE TRAN-1 FILED BY THE PETITIONER**
Exhibit -P3	**TRUE COPY OF THE DRC 03 CHALLAN DATED 13.11.2020**
Exhibit -P4	**TRUE COPY OF THE REFUND APPLICATION DATED 30.08.2021**
Exhibit -P5	**TRUE COPY OF ARN DATED 27.10.2021 RECEIVED IN RESPECT OF REFUND APPLICATION UNDER SECTION 55 OF THE CGST ACT**
Exhibit -P6	**TRUE COPY OF THE SHOW CAUSE NOTICE NO. 05/2021 DATED 13.10.2021 ISSUED BY RESPONDENT NO.2**
Exhibit -P7	**TRUE COPY OF THE REPLY DATED 18.11.2021**
Exhibit -P8	**TRUE COPY OF THE OIO NO. 35/2021(OIO) CENTRAL TAX & CENTRAL EXCISE (REFUND) DATED 10.12.2021 ISSUED BY RESPONDENT NO.2**
Exhibit -P9	**TRUE COPY OF THE LETTER DATED 22.03.2022 ISSUED BY RESPONDENT NO.2**
Exhibit -P10	**TRUE COPY OF THE CIRCULAR NO. 157/13/2021-GST DATED 20.07.2021**