Transitional Credit- A Pandora's Box?

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Goods and Services Tax (GST) is a significant Tax Reform whereby multiple taxes levied by the Central and the State Government are consolidated into a single tax. One critical aspect of the GST Law is a single Input Tax Credit that enables the taxpayer to claim credit for the taxes paid while purchasing or manufacturing goods in discharging its duties. Hence, the main purpose of GST is to prevent double taxation of the goods and services and cascading of taxes. Transitional Provisions enable carrying forward of CENVAT & VAT Credit from the previous tax regime and are very important to ensure transition to GST regime is smooth and hassle- free and no ITC (Input Tax Credit)/benefits earned in the previous regime are lost.

Section 140(1) enables a person to avail CENVAT Credit of the period immediately before 1-7-2017 in his Electronic Credit Ledger by following the procedure as prescribed and within such time. The Government using its powers under Section 164, made amendment to section 128 and added the words "within such time.." in the Section 140 with retrospective effect from 1-7-2017.By adding these words, the government intends to restraint the time limit in which the CENVAT credit of the previous period can be claimed.

Rule 117 was introduced on 28 June 2017 into the CGST Rules for specifying a time limit for availing the Transitional Credit by electronic submission of Form GST TRANS-1 on the common portal specifying the amount of ITC entitled under the provisions of Section 140. Thus, the final due date as per Rule 117 was 27-12-2017.

Rule 117(1A) came into force vide notification 48/2018 on 10-09-2018 for the benefit of such persons who could not file TRANS 1 within the due date due to 'technical difficulties on the common portal'. It enumerated March 31st, 2019 as the due date which finally extended to March 31st 2020 vide Order No 01/2020.

Thereafter, no circulars and orders were issued for the extension.

In case of **Brand Equities Treaties Ltd [TS-256-HC-2020(DEL)-NT]**, High Court of Delhi had stated that the CENVAT Credit is a property of the taxpayer in terms of Article 300A. It also held the time limit under Rule 117 is ultra-vires section 140.

The Delhi high court does not also concur with the benefit being provided only to the taxpayers whose cases are covered under "technical difficulties on common portal". It has stated this to be "arbitrary, vague and unreasonable". It also holds that since it is a completely online system, certain amount of time was required to adapt to it. It also takes into account the difficulties that the taxpayer faced which are not only due to technical glitches on the portal.

The Delhi High Court had also taken aid of Article 14 of the Constitution to hold a firm opinion that Government should not create a distinction and restrict the benefit of Rule 117(1A) to the persons who are facing technical glitches on the common portal alone and it should be extended to all the taxpayers. It is also stated that the main purpose of Transition Credit was to protect the rights of the taxpayers.

The High Court of Delhi also made reference to its judgment in case of **A. B. Pal Electricals Pvt. Ltd. Vs Union of India & Ors that** was passed in favour of the tax payers and said that it would not be fair to expect each registered person who has tried but could not upload Form TRANS 1 to preserve some evidence of it in the form of a screenshot. Many taxpayers who come from rural/semiliterate background *may not have*

had the presence of mind to create any record of their having tried, and failed, to upload the Form GST TRAN-1.

It has referred to the case of **M/s. Blue Bird Pure Pvt. Ltd. v. Union of India [TS-539-HC-2019(DEL)-NT]** whereby the Delhi High Court had held that genuine problems were faced by taxpayers since GSTN became operational (including difficulty in filling up a correct credit amount in the TRAN-1) and GSTN is still in 'Trial and Error' phase. *It stated that the judgement of Hon'ble Supreme Court in the* ***ALD Automotive Pvt. Ltd. vs. Commercial Tax Officer [TS-560-SC-2018-VAT]*** *would not apply to this case as CENVAT Credit was claimed in the return of the previous period unlike the case of ALD Automotive where ITC was claimed in the revised return after the due date.*

The High Court of Delhi has held that time-limit in Rule 117 is 'directory' and not 'mandatory' in nature and in absence of any specific provisions, residuary provisions of Limitation Act, 1963 would apply to determine the maximum period for availing such credit i.e. 3 years from the date of commencement of limitation. Thus, it allowed filing of TRANS-1 till 30-06-2020.

The High Court of Punjab and Haryana shared a similar view in the cases of **Amba Industrial Corporation [TS-400-HC-2020(PandH)-NT], Haryana Petro Oils (2020)** and **Ceamen Electronics(2020).**

The High Court of Calcutta in the case of **Subhas & Company vs Commissioner of CGST and CX, Kolkata [2020]** had also directed the tax authorities to reopen GST TRANS II to allow petitioner to claim the transitional credit held in stock as on the appointed date.

The High Court of Delhi in the case of **SKH Sheet Metals Components vs Union of India [TS-373-HC-2020(DEL)-NT]** has maintained that since the time limit for filing TRANS-1 has been extended consistently by Central Government, the time limit of 90 days is not sacrosanct. It further believes as the due dates are extended repeatedly, due date under Rule 117 is 'directory' and not 'mandatory'.

In the case of **Nelco Ltd. vs Union of India [TS-196-HC-2020(BOM)-NT],** it was held by the Bombay High Court that the time limit stipulated in Rule 117 is in consonance with the transitional nature of the enactment, and it is neither arbitrary nor unreasonable. It has stated that the power conferred under Section 164 to make rules is a wide power than Section 13(1) of Central Sales Tax and thus it is within its power to specify a time limit. Rule 117 cannot be held 'ultra vires'.

The Bombay High Court has also made reference to Section 16(4) of the CGST Act and stated that since time-limit is provided under section 16(4) to claim Input Tax Credit, prescribing a time-limit under Rule 117 is not contrary to the Act. The Bombay High Court has also stated that availment of input tax credit under section 140(1) is a concession and not a right, attached with conditions of its exercise within the time limit. It had also made reference to the cases of **JCB India Ltd(Bombay High Court) [TS-109-HC-2018(BOM)-NT]** and **Willwood Chemicals Pvt Ltd(Gujrat High Court)** which shared identical views.

The court held that IT Grievance cell has been established to examine the existence of technical difficulties and sufficient meaning has been provided under Rule 117(1A) to technical difficulties on the common portal. It also held that those registered persons who could not submit the declaration by the due date because of technical difficulties on the common portal as can be evidenced from the system logs are given an extension on the recommendation of the Council.

The Madras High Court in the case of **P.R. Mani Electronics Vs Union of India [TS-531-HC-2020(MAD)-NT] shared the same view.**

The High Court of Madras referred to the judgement of Hon'ble Supreme Court in **Jayam and Company Assistant Commissioner and another, [TS-330-SC-2016-VAT], where it was held** categorically, in the context of the TNVAT Act, that ITC is a concession**. This principle was reaffirmed in the recent judgement of the** Hon'ble **Supreme Court in case of ALD Automotive Private Limited v. Commercial Tax Officer, now upgraded as Assistant Commissioner(ct) and others, (2019) 13 SCC 225 (ALD Automotive) where the court reiterated that ITC can be availed of only as per the terms & conditions. The** Hon'ble Supreme Court held that the time limit for filing the tax return under Section 19(11) of the TNVAT Act was mandatory because it used the word "shall". By this analogy Rule 117 should also be construed as mandatory.

CBIC had issued a circular on 22-06-2020 to offer clarification on some of the views presented in the writ petitions. In its circular, CBIC referred to various Judgements passed by Hon'ble Supreme Court from time to time as well as various provisions of CGST Act. Main viewpoints of CBIC that can be extricated from the circular are:

1. CENVAT Credit/Input Tax Credits are not absolute vested right over and above the statue and are subject to statutory provisions and rules under which they exist.
2. Rule 117/120A of CGST Rules 2017 are within the Rule-making power of the Central Government under CGST Act, 2017.
3. The Time limit prescribed under Rule 117/120A of CGST Rules, 2017 is Rational and Mandatory.
4. Sub- Rule (1A) of Rule 117 of CGST Rules, 2017 cannot be termed as arbitrary or vague and is well within the four corners of the statute.

Taking into account the above, it can be concluded that the Government is taking all the measures in order to protect its revenue. But it is also known that the term 'technical difficulties' as used in rule 117 is not defined under the CGST Act,2017. The dictionary definition of the same is "*A difficulty arising from a method of procedure; (now also) a technological problem"*. Even when used in reference to difficulties on the common portal, technical difficulties not only include technical glitches while uploading the form but also the difficulties faced by the tax-payer in the following the procedure, for instance in filling up the form, claiming the credit, downloading the form, accessing the portal etc. Benefits of Rule 117(1A) should not be restricted to the persons facing technical glitches while uploading the form alone.

As per the circular, CBIC contends that the reason that time limit is prescribed under any law is that the benefits of tax credits at a large scale cannot be allowed to linger indefinitely as it would have a direct impact at the tax collection, estimates and budgetary allocations. Thus, time limit under Rule 117/117(1A) should be considered mandatory. However, the residuary provisions of the Limitation Act limit the time within which the Transitional Credit can be taken by tax-payer to 30-06-2020. So, it is not purported for the credit to be carried on till perpetuity.

Moreover, the sudden implementation of GST has had a major impact on a wide population of the country. Many tax-payers were not prepared to shift to entirely computerized system and some quantum of time is required for them to adapt. Provisions of ITC are the backbone of the GST Regime which essentially makes it a Value Added Tax i.e. collection of Tax at all the points of supply chain after allowing credit of taxes at the earlier points. Therefore, Tax-payers must be allowed to claim the Transitional Provisions by submission of Form TRANS-1, it being a vested right. However, it is believed the issue will settle only with the detailed judgment of a full bench of the supreme court, till then someone will keep on litigating this issue.