

Transition troubles for ‘Cesses’: Ray of Hope for claiming refund

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Background of transitional credit:

Ever since introduction of GST, the eligibility of the cess credit for carry forward in GST period or claiming of its refund under law has been subject matter of intense debate. Section 140 (1) of CGST Act originally allowed to carry forward CENVAT Credit which *inter-alia* included the Cess Credit also. Since it did not debar the carry forward of ‘Cess credit’, there was attempt made by the Central Government by way of the retrospective amendment which is discussed herein below.

Retrospective Amednment- purpose served?

The Section 28 of Central Goods and Services Tax (Amendment) Act, 2018 amended the section 140 which is extract herewith for ready reference,

“28. In section 140 of the principal Act, *with effect from the 1st day of July, 2017*,—

(a) in sub-section (1), after the letters and word “CENVAT credit”, the words “of eligible duties” shall be inserted and shall always be deemed to have been inserted;

(b) in the Explanation 1—

(i) for the word, brackets and figures “sub-sections (3), (4)”, the word, brackets and figures “sub-sections (1), (3), (4)” shall be substituted and shall always be deemed to have been substituted;

(ii) clause (iv) shall be omitted and shall always be deemed to have been omitted;

(c) in the Explanation 2—

(i) for the word, brackets and figure “sub-section (5)”, the words, brackets and figures “sub-sections (1) and (5)” shall be substituted and shall always be deemed to have been substituted;

(ii) clause (iv) shall be omitted and shall always be deemed to have been omitted;

(d) after Explanation 2 as so amended, the following Explanation shall be inserted and shall always be deemed to have been inserted, namely:—

‘Explanation 3.—For removal of doubts, it is hereby clarified that the expression “eligible duties and taxes” excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975.’”

The above amednment proposed to amend Section 140(1), *ibid* to refer the definition of ‘Eligibile duties’ as given under Explanation 1 & 2 of the Section 140 of CGST Act, 2017 which do not cover the credit of EC & SHEC thereby the attempt was made to deny the carry forward of EC & SHEC into GST. However, the power of enforcement of the Amendment Act was reserved vide Section 1(2) of the Central Goods and Services Tax (Amendment) Act to such date as the Central Government may, by notification in the official Gazette, appoint. Accoridngly, Notification No. 02/2019-

C.T. dated 29.01.2019 has notified the provisions of the Central Goods and Services Tax (Amendment) Act, 2018 with effect from 01.02.2019 however the sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of section 28, *ibid* are not notified (underlined portion in the above extract) thereby the definition of 'eligible duties' contained in explanation 1 or explanation 2 of section 140, *ibid* is inapplicable to the section 140(1), *ibid*.

The Explanation 1 of the section 140, *ibid* defines the expression 'eligible duties' relating to the stock of inputs as on 01.07.2017 and that is the reason the definition was specifically made applicable to the sub-section (3), (4) and (6) of Section 140 of CGST Act, 2017 which deals with the credit on the stock as on 01.07.2017 whereas the impugned Section 140(1), *ibid* provides for the carry forward of the closing balance and nothing to do with stock as on 01.07.2017. therefore, in absence of any specific reference for application of the definition 'eligible duties' contained in explanation 1 and also the limited applicability of the said explanation, it is submitted that the definition of 'eligible duties' contained in explanation 1 is inapplicable to the instant case of carry forwarded credit u/s. 140(1), *ibid*.

Similarly, the explanation 2 of the section 140, *ibid* cannot be made applicable in the present case, as the words used therein is "eligible duties and taxes", while the words used in sub-section 1 of section 140 is "eligible duties" only. Further, the explanation 2 while defining the types of duties refers to the inputs/input services received after the appointed day (01.07.2017) and also specifically made applicable to the sub-section (5) of Section 140, *ibid* alone whereas the impugned Section 140(1), *ibid* provides for the carry forward of the closing balance and nothing to do with stock as on 01.07.2017. therefore, in absence of any specific reference for application of the definition contained in explanation 2 and also the limited applicability of the said explanation 2, it is submitted that the definition contained in explanation 2 is inapplicable to the case of carry forwarded credit u/s. 140(1), *ibid*. therefore, the EC & SHEC credit is rightly eligible for the transfer into GST.

Explanation 3 which was proposed to be inserted in Section 140 of CGST Act, 2017 also does not effect the eligibility of the carry forward of Cess credit inot GST *inter alia* due to .

- a. Owing to use of the words '*after Explanation 2 as so amended, the following Explanation shall be inserted and shall always be deemed to have been inserted, namely*', it is submitted that the explanation 3 requires the amendment in explanation 2. As the amendment in explanation 2 is not notified, the consequently the explanation 3 would not take effect;
- b. Even assuming explanation 3 takes the effect independent of explanation 2 amendment effectiveness, it refers to the expression 'eligible duties and taxes' whereas the impugned Section 140(1), *ibid* uses the expression 'eligible duties' only;

In view of the above, it is possible & plausible to say that EC & SHEC is eligible for the carry forward into GST even after the amendment.

However, the Madras HC decision in case of Assistant Commissioner vs. Sutherland Global Services Private Limited 2020 (10) TMI 804 (reversed the Single judge decision) and C.B.I. & C. Circular No. 87/06/2019-GST, dated 2-1-2019 are against.

Whether refund could be still claimed if cess credit reversed earlier following the intent of Retro amendment (under protest or otherwise) or not taken at all in Tran-1?

One could evaluate the options for taking the benefit by way of re-availing the credit under intimation to department and ask for SCN to contest under GST. Alternatively, one could evaluate the possibility of claiming the refund of the same based on some of the fundamental principles discussed below:

- i. There is no specific provision that made lapsing of vested accrued right and cannot be taken away. CCE, Pune vs. Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.), Eicher Motors Ltd Vs Union of India 1999(106) E.L.T. 3 (S.C), Filco Trade Centre Pvt Ltd Vs. Union Of India 2018-TIOL-120-HC-AHM-GST; Commissioner v. Bhavin Textiles — 2008 (221) E.L.T. 44 (Guj.)
- ii. Credit is property and taking away without specific provision is violation of article 300A of Constitution of India. The various decisions in the context of Tran credit can be referred. A.B. Pal Electricals Pvt. Ltd. v. Union of India — 2020 (33) G.S.T.L. 8 (Del.); Brand Equity Treaties Limited v. Union of India — 2020 (38) G.S.T.L. 10 (Del.)
- iii. Any construction to deny the refund violates Section 174(2)(c) of CGST Act, 2017 which says that repeal of existing laws do not take away the vested right accrued

The following decisions held that such amount is refundable:

DB decision in case of BHEL vs. CCT, Bhopal 2020-TIOL-1341-CESTAT-DEL & followed in Schlumberger Asia Services Ltd Vs CCE & ST 2021-TIOL-313-CESTAT-CHD - relying on Kar HC decision in Slovak Trading case.

In Kirloskar Toyota Textile Machinery Pvt. Ltd. decided by Bangalore CESTAT, it has been held by honourable CESTAT Bench that the refund of cess cannot be denied as there is no provision for lapsing of the same.

To summarize,

- i. There is no specific provision that providing for lapsing.
- ii. Similar no specific provision for restricting/allowing the refund. The different HC's has different views and matter may travel upto SC
- iii. The final say of SC on Tran credit will have bearing effect on this
- iv. **If finally settles in favour, the amount would be refunded or else become the cost. Hence, it is advisable to make an attempt to claim refund and fight in absence of any additional cost/consequences (except legal exp)**

Time limits to be applied if refund claim is filed:

- i. Important question arises whether time limit is applicable for filing of the refund claim. The clause (f) of explanation to Sec 11B says the date of payment of duty. But how to determine it – credit goes to common pool where no concept of FIFO/LIFO & some portion would have used? No specific provision u/s. 11B, hence one would need to evaluate if the principles of reasonable period/Limitation Act could be applicable? One could consider the filing of refund considering the judgment of Supreme Court extending time limit of limitation in view of the Covid.
- ii. It could be possible that the ITC was transferred and reversed due to Retro amendment under GST after being pointed by dept. Could it be said that the date of notifying the Retro amendment is relevant date for determining the time limit? SC in Sunrays Engineers Pvt. Ltd. v. Commissioner — [2015 \(318\) E.L.T. 583](#) (S.C.).

One also need to consider that in case it was transferred to GST but reversed under protest – whether it would be protest u/s. 11B considering the fact that what was reversed was under GST, not under 11B. Whether it would get restored to closing balance status?.

Plan of action for business:

Wherever benefit of cess credit is not availed, one could consider taking below action for evaluating if benefit is admissible:

- Collate all the facts for the treatment given for cess credit (i.e. not carried forward to GST, carried forward but reversed with or without protest, filed refund claim, contesting with department or any other)
- Evaluate the possibility of claiming benefit under applicable facts in view of the above analysis and court jurisprudence
- Make an attempt to file the refund claim and contest matter. Not doing anything today will make it permanent cost.
- Consider the importance of time for taking decision in view of limitation period

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