

Denial of carry forwarding of CESS credit into GST – Course of action

- CA Sudhir V S
& CA Venkata Prasad

On introduction of GST, the credit of taxes under the existing law, predominantly Central Excise, Service Tax and Value Added Tax, was allowed to be carry forwarded vide the transitional provision either as Central Goods and Service Tax (CGST) or State Goods and Service Tax (SGST) as the case may be accordingly taxpayers did carry forwarded the credit by filing transactional credit by filing Form TRAN -01. The common observation of the department during the transitional credit verification is that the closing credit balance of the Education Cess, Secondary and higher Education Cess, Krishi Kalyan cess (herein after referred as 'Cess credit' for brevity) is not eligible for the transfer into GST. However, Section 140(1) of CGST Act, 2017 provides *that register person shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day.* As per the CENVAT credit Rules, 2004 cess credit is also considered as CENVAT, '*eligible credit*' was defined but was not made applicable to section 140(1) *ibid* and hence there was no any restriction for carry forward of such credit. Based on the above understanding, many taxpayers have carried forwarded the closing balance of Cess credit into GST via Form Tran-1.

Government vide Clause 28 of CGST (Amendment) Act, 2018 has made the retrospective amendment w.e.f. 01.07.2017 in the Section 140(1), *ibid* replacing "*eligible credit*" for "*CENVAT credit*" to disallow the carry forward of the Cess credit into GST. By virtue of this amendment, the closing balance of Cess credit is not transferable as ITC under GST. This article discusses the course of action that the tax payer, who have carried forward the credit requires to take.

1. Reversal of the ITC: As the amendment is retrospective in nature, the amount of Cess credit carry forwarded into GST becomes the transfer of irregular credit and requires to be paid back to the Government. The same may be paid back by way of reversal of CGST credit through Table 4(B)(2) of the GSTR – 3B and intimate the department in writing with a dated acknowledgement. In case there is no sufficient credit this gets reflected into to electronic output register and needs to be paid in cash.
2. Interest liability: The consequential interest liability would vary in different scenarios which are discussed below:
 - a. When CESS credit carry forwarded into GST but not utilized: As far as interest on input tax credit, the reference shall be made to the section 50(3) of CGST Act, 2017 which specifies that interest is required to be paid by a taxable person at 24% if he claims any undue or excess claim of input tax credit under Section 42(10) and Section 43(10). As these sub-section deals with the concept of matching, reversal and reclaim of input

tax credit which are not in force as on date therefore there will not be any liability under the said section. Further on reading of Section 50, it is evident that there is no interest on mere availment of ITC. Further, there is no other provision in CGST Act, 2017 requiring the taxable person to pay interest on mere excess availment of input tax credit, **hence there is no need to pay interest on CESS credit.**

- b. When CESS credit carry forwarded into GST and utilized also: If any input tax credit availed is utilized for making payment of GST and such input tax credit was subsequently becomes ineligible then the tax payment made earlier by utilizing such input tax credit would amount to non-payment of GST therefore the said non-payment results in delay payment of GST and the same is required to be paid along with interest @18% under Section 50(1) of CGST Act, 2017. **Hence, the CESS credit carried forwarded was utilized for making payment of GST liabilities then the same shall be reversed along with interest from the date of utilization to actual date of reversal.**

Is there any waiver of the interest liability as the ineligibility was due to retrospective amendment?

It Is very important to note that the 'Cess credit' was eligible upto the enactment however it is becoming ineligible from the past date on the date of enactment, so non-payment of the output liability (to the extent of utilization) will be on the date of enactment, which has to be made good by making the payment and hence the question of interest arises. In general, whenever retrospective amendment was made, it was the practice of the Government to give a saving clause in terms of either waiver of the interest liability or specify the cutoff date from which the interest liability would attract. Unfortunately, no such saving clause is found in the present retrospective amendment made in the section 140, *ibid*.

Judicially, the Hon'ble Supreme Court in case of Star India Pvt Ltd Vs CCE, Mumbai 2006 (1) STR 73 (SC) held that interest liability does not arise "*The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect*". However, this judgement was delivered in the context of amendment provisions containing the validation clause for payment of the interest liability which is missing in the present amendment. It is not clear to what extent rationale of the decision can be applied to minimize the interest liability. The Hon'ble High court in case of CCE Vs JCB India Ltd 2018-TIOL-1919-HC-MUM-CX noted the said aspect and admitted the revenue appeal which is pending for disposal as of now. Representation can be made to the Government for waiver of the interest liability.

3. How to Encash the Cess Balance: As there is no provision for lapse of closing balance of Cess Credit under the old law (CENVAT Credit Rules, 2004) and that CENVAT held to be vested right of the tax payer, the taxable person can apply for the refund of the same as per the provisions of the old law.

(This article is written on 22.10.2018. For any feedback/queries e-mail to sudhir@hiregange.com or venkataprasad@hiregange.com, laxman@hiregange.com)