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**Transitional Credits – Not
everyone can knock your door**

Introduction

Implementation of GST from July 1, 2017 was like quick fix. It gave no time to taxpayers, or the taxman to prepare, and the legislation as well as the IT Infrastructure were in nascent trial and error phase. The erstwhile laws (central excise, service tax, VAT, entry tax *et al*) were omitted / repealed, and the new law saw the dawn in a hazy horizon. Only time could test how good and simple the tax regime would turn out to be.

The first step into the new regime started with transitioning of credits of erstwhile taxes. To cater to this, the GST Law incorporated transitional provisions which permitted transition of credits from erstwhile regime into GST regime subject to conditions specified under the transition provisions. However, the journey to transition credits of erstwhile law into GST regime was a roller coaster ride for taxpayers, as the same was fraught with technical glitches, human errors for want of clarity and lack of flexibility in the IT system without any legal redressal mechanism. Resultantly, a large number of taxpayers could not transition their credits and very soon the constitutional courts were flooded with writ petitions for resolution of transitional credit issues. Ultimately, the Apex Court in *Filco trade judgement*¹ directed reopening of the GST Portal permitting filing and revising of transitional credit forms by the taxpayers.

The taxpayers who were fortunate to transition their credits of erstwhile regime into the GST regime, also faced scrutiny of credits transitioned both under the erstwhile laws as also under the GST. The scrutiny by GST authorities is not limited to the conditions prescribed under transition provisions, but they encompassed into the eligibility of credit in the erstwhile laws. This led to jurisdictional issues where GST authorities sought to deny transitional credits by alleging wrongful availment of credit under the erstwhile laws. For this, GST authorities started issuing recovery notices under Sections 73 or 74 of GST Act for alleged contraventions of the erstwhile laws read with transition provisions under the GST law.

Simultaneously, the authorities under the erstwhile regime also undertook verification of eligibility of credits availed by taxpayers under the erstwhile regime and initiated recovery proceedings therein. Such proceedings under the erstwhile laws have been duly saved under Section 174 of the GST Act.

Apropos this dichotomous situation, through this article, the authors have delved into the aspect as to whether GST authorities have jurisdiction to venture into eligibility of credit in the erstwhile laws and make that as the basis for denying transitional credit. Authors have also drawn correlation of such powers with recent circulars² issued by Central Board of Indirect Taxes and Customs (CBIC) for verification of transitional credits after *Filco trade judgement*.

Recent Jurisprudence on the issue

Recently In the case of ***Usha Martin Limited v. AC, CGST & CE, 2022-VIL-779-JHR***, the petitioner transitioned CENVAT credit through TRAN-1. Revenue formed a view that the petitioner wrongly transitioned CENVAT credit from erstwhile law as there were contraventions relating to distribution of credits by the Input Service Distributor to petitioner under the erstwhile law. Thus, to recover such transitioned credit, revenue passed order under Section 140 read with Section 73 of the GST Act by holding that petitioner contravened provisions of Cenvat Credit Rules. The petitioner challenged the order through writ petition before the Jharkhand High Court.

The Court examined and evaluated the transition provisions, recovery provisions and savings provisions under GST law as also provisions of Cenvat Credit Rules, Central Excise Act and Finance Act, 1994. The Court noted that the alleged contraventions relate to the erstwhile laws, however, proceedings for the same were initiated under Section 73 of the GST Act. It also noted that definition of Input Tax Credit (ITC) under GST Act does not cover CENVAT credit. Section 174 of the CGST Act saves jurisdiction of revenue to initiate proceedings under the erstwhile laws.

¹UOI v. Filco Trade Centre Private Limited, SLA(C) No. 32709-32710/2018

²Circular No. 180/12/2022-GST dated September 9, 2022 and Circular No. 182/14/2022-GST dated November 10, 2022

Proceedings under GST Act can be initiated only if conditions of transition provisions are violated. Parallel proceedings under GST Act and erstwhile laws will lead to chaotic situation. Basis above, the Court quashed the adjudication order.

Analysis of the issue

Section 140 of the GST Act empowers a registered person to transition credit of eligible duties and taxes carried forwarded in the returns under erstwhile laws to his electronic credit ledger under GST. This Section also provides for following three conditions for permitting transition:

- where the said amount of credit is not admissible as ITC under GST Act; or
- where the taxpayer has not furnished all the returns required under the erstwhile law for the period of six months immediately preceding July 1, 2017; or
- where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

Thus, scrutiny of transitional credit by GST authorities cannot travel beyond these conditions. Rule 121 of the GST Rules further provides that the amount credited may be **verified** and proceedings for the same may be initiated under GST Act. However, this verification is limited to the four corners of conditions prescribed under transition provisions and do not permit usurpation of jurisdiction into erstwhile laws. Therefore, determination of eligibility of credit under erstwhile laws and disallowance of transitional credit basis the same is clearly overstepping of jurisdiction.

The Central Excise Act and the Finance Act were repealed after the enactment of GST Act. As per legal interpretation, an outright repeal of a statute destroys the effectiveness of repealed Act in future and divests the right to proceed under the replacing statute. However, this is not the case with GST law as Section 174 explicitly provides for repeal and savings clause which provides that repeal of erstwhile laws shall not affect any investigation, inquiry, verification, assessment proceedings, adjudication and any other legal proceedings and all such proceedings may be instituted, continued or enforced as if these Acts had not been so repealed. Therefore, this argument clearly supports the view that proceedings regarding eligibility of transitional credit can only be initiated under the erstwhile laws and not under GST Act.

Even otherwise, Section 73 and 74 of GST Act deal with recovery of any tax, interest or penalty or ITC wrongly availed or utilised. ITC has been defined under Section 2(63) of the CGST Act as credit of Input Tax. Input Tax has been further defined under Section 2(62) of the CGST Act. Transitional credit is credit pertaining to duties and taxes paid under erstwhile laws and carried forward under GST Law. **Input tax** only covers CGST, SGST or IGST payable on supply (or receipt) of goods or services under GST Law. Transitional credit is not ITC under GST Act as it is not charged or paid on supply of goods or services. Transitional credit pertains to duties and taxes paid under erstwhile laws and carry-forwarded in terms of Section 140 of GST Act. Definition of ITC does not cover transitional credit. There is no provision under GST Act or GST Rules which equates transitional credit with ITC. Transitional credit and ITC are given differential treatment under GST Act and GST Rules. Same has also been clarified vide a circular³ and catena of judgements. This argument thus establishes that no proceedings can be initiated for recovery of transitional credit under Section 73 or 74 of the GST Act as the term 'ITC' used in these Sections does not cover transitional credit within its meaning.

After the Filco Trade judgement, CBIC has recently issued circulars prescribing guidelines for filing / revising of transitional credit forms as well as **verifying** the same. The scope of verifications as laid down in the circulars suggest as if the GST authorities have to look into the eligibility of credit sought to be transitioned in the GST regime. However, as already discussed, Section 140 prescribes only three restrictions for transition of credits and the circulars cannot enlarge the scope of conditions of Section 140, nor can they introduce new conditions. Thus, circulars are running beyond the GST Act as also directions of Supreme Court, and thus are not tenable. In practice, however, till the circulars are not declared invalid, the GST authorities are likely to assume jurisdiction to verify eligibility of transitional credits under the erstwhile laws.

³Circular – F. No. 332/6/2016-GST (Policy Wing) Pt.1, dated January 15, 2018

Parting thoughts and way forward

Pursuant to Apex Court directions, the Portal has just closed. Revenue has time till February 28, 2023 to verify the transitional credits. It is expected that the judgment in the case of ***Usha Martin*** (supra) poses deterrence to GST authorities not to venture into eligibility of transitional credits under erstwhile laws and not to initiate proceedings under Section 73 or 74 of GST Act without jurisdiction. However, CBIC Circulars are likely to disturb this harmony and are likely to result in a spurt in litigation in the times to come. It will be interesting to closely watch this space.



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