

TRAN-1 Trauma - No Treatment found yet - Count down started!

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TRAN-1 is the artery to infuse the eligible cenvat credit from the erstwhile tax regime to GST. Transitional provisions for this purpose have been provided in the CGST Act. Section 140 of the CGST Act, 2017 empowers the government to prescribe the procedure in this regard. Accordingly rule 117 of the CGST Rules, 2017 prescribed the filing of TRAN-1 to carry the credit balance of earlier tax regime to GST. Earlier, the provisions of section 140 did not provide the power to prescribe the time limit to file the TRAN-1. Yet rule 117 prescribed 90 days time limit file TRAN-1 and the commissioner was empowered to extend the time limit upon the recommendation of the GST Council.

In the Finance Act, 2020, a “*retrospective*” amendment was made to the provisions of section 140 enabling it to prescribe the time limit. As per the settled legal principles, Parliament is empowered to make the retrospective amendment with respect to provisions beneficial to the taxpayers. No retrospective amendment can be made which restricts the rights of the taxpayers.

Even today, most of the problems faced by the taxpayers in GST compliance is on account of the inefficient functioning of the GST portal. The taxpayer’s pocket is burning due to the incompetence of GST network. It is close to 3 years since the introduction of GST, still many of the forms are not yet made available in the portal, many of the provisions are not compliable.

The number of notifications issued to change in the procedures, number of clarificatory circulars issued, number of circulars withdrawn due to confusions created therein and the number of writ petitions filed at various High Courts till today are the evidence of the lacuna and ambiguity in the GST law and depicts the preparedness of the GST portal.

It is surprising that the GST Council is not heeding to the orders of the various High Court direction to re-open the portal for filing TRAN-1 or to accept the manual TRAN-

1. The department is very much sitting on the proof of 'technical glitch' to allow the taxpayers to file or revise the TRAN-1. There is no term 'technical glitch' defined in the GST Act or Rules made thereunder. The sole architect, owner and authority of this 'technical glitch' is the GST network and the department is riding on it and the taxpayer is bleeding on account of this.

The mitigating of the cascading effect of taxes and to reduce the litigations were among the objectives of introduction of GST. However, currently the department is expecting all those taxpayers who have trouble in filing the TRAN-1 is to go to High Courts!

Various judicial pronouncements on TRAN-1 is as under;

Brand Equity Treaties Ltd.,¹ (order dated 05.05.2020)

The upshot of this experience is that the GSTN network, indeed, is riddled with shortcomings and inadequacies. This is palpably evident from the sheer number of cases being presented before us, in relation to such technical difficulties and inadequacies. The benchmark, is that the online system brought into force by the GSTN Ltd. should be able to perform all functions and should have all flexibilities/options, which were available in the pre-GST regime. The problems on the GSTN cannot be wished away, and have to be resolved in the right earnest. This requires sensitivity on the part of the Government which has, unfortunately, not been exhibited in adequate measure.

There is nothing sacrosanct about the time limit so provided. It is not as if the Act completely restricts the transition of CENVAT credit in the GST regime by a particular date, and there is no rationale for curtailing the said period, except under the law of limitations. The period of 90 days has no rationale and as noted above, extensions have been granted by the Government from time to time, largely on account of its inefficient network.

The arbitrary classification, introduced by way of sub Rule (1A), restricting the benefit only to taxpayers whose cases are covered by "technical difficulties on common portal" subject to recommendations of the GST Council, is arbitrary, vague and unreasonable

The credit standing in favour of the assessee is a vested property right under Article 300A of the Constitution and cannot be taken away by prescribing a time-limit for availing the same.

¹ 2020-TIOL-900-HC-DEL-GST

The provision Rule 117 is read down as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit and therefore, the same would not result in the forfeiture of the rights, in case the credit is not availed within the period prescribed.

Accordingly, since all the Petitioners have filed or attempted to file Form TRAN-1 within the aforesaid period of three years they shall be entitled to avail the Input Tax Credit accruing to them. They are thus, permitted to file relevant TRAN-1 Form on or before 30.06.2020. Respondents are directed to either open the online portal so as to enable the Petitioners to file declaration TRAN-1 electronically, or to accept the same manually. The other taxpayers who are similarly situated should also be entitled to avail the benefit of this judgment.

The Hon. Supreme Court in its Order dated 19.06.2020 has stayed the operation of the order in case of Brand Equity Treaties Ltd (*supra*)

Amba Industrial Corporation² (Order dated 18.06.2020)

It is not appropriate to declare rule 117(1A) invalid, but the Petitioner is entitled to carry forward Cenvat Credit accrued under Central Excise Act, 1944. The Respondents have repeatedly extended date to file TRAN-I where there was technical glitch as per their understanding. Repeated extensions of last date to file TRAN-I in case of technical glitches as understood by Respondent vindicate claim of the Petitioner that denial of unutilized credit to those dealers who are unable to furnish evidence of attempt to upload TRAN-I would amount to violation of Article 14 as well Article 300A of the Constitution of India.

In view of decision of this Court in the case of Adfert Technologies Pvt. Ltd. (*Supra*) and Delhi High Court in the case of Brand Equity Treaties Ltd. (*Supra*) present petition deserves to be allowed and accordingly allowed. The Respondents are directed to permit Petitioner to upload TRAN-I on or before 30.06.2020 and in case Respondent fails to do so, the Petitioner would be at liberty to avail ITC in question in GSTR-3B of July 2020.

Mangla Hoist Pvt Ltd.³ (Order dated 17.06.2020)

Division Bench in Brand Equity Treaties Ltd (*supra*), has held that the time limit of 90 days prescribed in Rule 117 of the CGST Rules is not mandatory but directory in nature. It was also held therein the judgment is to be publicised by uploading it on

² 2020-TIOL-1046-HC-P&H-GST

³ 2020-TIOL-1037-HC-DEL-GST

the respondent's website and that all the assesseees, who were unable to upload TRAN-1, could do so on or before 30th June, 2020.

Since there is no stay on the said order, the respondents are under an obligation to abide by the directions issued therein by adequately publicising the said decision and uploading it on their website as also by opening its common portal to enable the petitioner and all similarly placed parties to upload TRAN-1, for claiming transitional credit.

The respondents are directed to ensure compliance of the captioned judgment by **19.06.2020**, particularly since the cut of date fixed by the court in the said case is **30.06.2020**, which would leave only ten clear days for the petitioner and similarly placed assesseees to take necessary steps.

SKH Metal Sheet Components⁴ (order dated 16.06.2020)

The law should provide for a remedial avenue. The stand of Central Government, focusing on condemning the Petitioner for the clerical mistake and not redressing the grievance, is unsavory and censurable. Tax laws, as it is, are complex and hard to interpret. Moreover, no matter how well conversant the taxpayers may be with the tax provisions, errors are bound to occur. Therefore, if the tax filing procedures do not provide for an appropriate avenue to correct a bona fide mistake, the same would lead to the taxpayers avoiding compliances.

The necessary Forms under GST are difficult to identify and the Government had to put efforts to assist the citizens in understanding the procedures. Nevertheless, all things considered, in spite of the amendment to section 140, the decision in Brand Equity Treaties Ltd (*supra*) is not entirely resting on the fact that statute did not prescribe for any time limit for availing the transition of the input tax credit. There are several other grounds and reasons enumerated in the said decision that continue to apply with full rigour even today, regardless of amendment to Section 140 of the CGST Act.

The time limit of 90 days is not sacrosanct. In Brand Equity Treaties Ltd. (*supra*), that court has observed that the government has not ascribed any meaning to the words 'technical difficulties on the common portal' and it cannot be interpreted in a restrictive manner

⁴ 2020-TIOL-1031-HC-DEL-GST

Both the Act and Rules do not provide any specific consequence on failure to adhere to the timelines. Since the consequences for non-compliance are not indicated, the provision has to be seen as directory. Pertinently, nonobservance of the timelines would prejudice only one party- the registered person/taxpayer. If the timelines held to be mandatory, the failure to fulfil the obligation of filing TRAN-1 within the stipulated period, would seriously prejudice the taxpayers, for whose benefit section 140 has been provided by the legislature. In view of the above discussion, interpreting the procedural timelines to be mandatory would run counter to the intention of the legislature and defeat the purpose for which the transitional provisions have been provided and have to be construed as directory and not mandatory.

There is no convincing reason to hold that as on date, the revision of the said return, will be time-barred and treated to be a fresh return. The revised data can be easily verified and correlated with the tax returns filed in the erstwhile regime. In fact, Rule 120A of CGST Rules is an enabling provision that can be resorted to, by the taxpayers to revise the Form GST TRAN-1 on the common portal within the time specified in the rules or such further period as may be extended by the Commissioner

Petitioner is permitted to revise TRAN-1 Form on or before 30.06.2020 and transition the entire ITC, subject to verification by the Respondents. The Respondents should either open the online portal so as to enable the Petitioner to file revised declaration TRAN-1 electronically, or to accept the same manually.

Chogori India Retail Ltd.⁵,

It is not denied by the Respondent that the Petitioner is entitled to carry forward such TC and use it for payment of the taxes under the CGST Act. It is also not in dispute that there have been numerous glitches on the GST Portal in making it difficult for uploading of the TRAN-1 Forms. This Court has itself issued orders in numerous cases permitting Petitioners to be afforded one more opportunity to either file the TRAN-1 Form electronically or manually. Accordingly, a direction is issued to the Respondent to either re-open the portal to enable the Petitioner to file its TRAN-

⁵ 2019-TIOL-1823-HC-DEL-GST

1 Form electronically failing which to permit it to file manually on or before 13th September, 2019.

The Hon Supreme Court⁶ declined to interfere in the Order and dismissed the SLP filed against the above Order.

Adfert Technologies Pvt. Ltd.⁷

The introduction of Rule 117(1A) & Rule 120A and absence of any time period prescribed under Section 140 of the Act indicate that there is no intention of government to deny carry forward of unutilized credit of duty/tax already paid on the ground of time limit.

The Respondents is directed to permit the Petitioners to file or revise where already filed incorrect TRAN-1 either electronically or manually statutory Form(s) TRAN-1 on or before 30th November 2019. The Respondents are at liberty to verify genuineness of claim of Petitioners but nobody shall be denied to carry forward legitimate claim of CENVAT/ITC on the ground of non-filing of TRAN-I by 27.12.2017

The Hon Supreme Court⁸ has dismissed the SLP filed by the department against this order.

Siddharth Enterprises⁹

The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 for failure to file declaration form GST Tran-1 within the due date, i. e. 27.12.2017.

The time limit prescribed under Rule 117 to allow the availment of the ITC with respect to the purchase of goods and services made in the pre-GST regime and post-GST regime is arbitrary, irrational and unreasonable and, therefore, it is violative of Article 14 of the Constitution.

The due date contemplated under Rule 117 of the CGST Rules to claim the transitional credit is procedural in nature and thus merely directory and not a mandatory provision.

⁶ 2020-TIOL-114-SC-GST-LB

⁷ 2019-TIOL-2519-HC-P&H-GST

⁸ 2020-TIOL-64-SC-GST

⁹ 2019-TIOL-2068-HC-AHM-GST

By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST TRAN-1 within the due date may severely dent the writ-applicants working capital and may diminish their ability to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution.

The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and is, therefore, arbitrary and irrational.

The phrase “technical difficulties on the common portal” should be given a liberal interpretation because it is a settled principle of law that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other.

Few other decisions wherein similar views were expressed are as under;

- (a) Krish Authomotors Pvt. Ltd.¹⁰
- (b) Ganapati Advisory Ltd.¹¹
- (c) Arora & Company¹²
- (d) Mrinal Ghosh¹³
- (e) Soni Traders¹⁴
- (f) SRC Aviation Pvt Ltd¹⁵

- (g) Jakap Metind Pvt. Ltd.¹⁶
- (h) Tara Exports¹⁷
- (i) Uninav Developers Pvt. Ltd¹⁸.
- (j) Tyre Plaza¹⁹
- (k) Blue Bird Pure Pvt. Ltd²⁰.

The principles emanating from the above decisions may be summarized as under;

¹⁰ 2019-TIOL-2153-HC-DEL-GST

¹¹ 2019-TIOL-1602-HC-ALL-GST

¹² 2019-TIOL-2544-HC-DEL-GST

¹³ 2019-TIOL-2676-HC-KOL-GST

¹⁴ 2019-TIOL-2932-HC-DEL-GST

¹⁵ 2019-TIOL-2931-HC-DEL-GST

¹⁶ 2019-TIOL-2931-HC-DEL-GST

¹⁷ 2018-TIOL-2872-HC-MAD-GST

¹⁸ 2019-TIOL-1661-HC-DEL-GST

¹⁹ 2019-TIOL-1902-HC-DEL-GST

²⁰ 2019-TIOL-1564-HC-DEL-GST

- The provisions of the section 140 is not mandatory and only directory.
- Transitional credit is a vested right and is protected under Article 300A of the Constitution which cannot be taken away due to procedural lapse.
- Denying the transitional credit violates Article 14 of the Constitution.
- Civil rights can be enforced within 3 years under the Limitation Act 1963, which should be applicable to GST also.
- There is nothing called ‘technical glitches’ in the GST provisions. That should not be the criteria to allow the taxpayers to file the TRAN-1.
- Denial of the transitional credit affects the working capital and may diminish the ability of the taxpayers to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution.

The Delhi High Court, in the case of SKH Sheet Metal Components (*supra*) went on to criticize the functioning of the department as under;

“We may just add that we do not derive any pleasure when we make such observations, as comments of the Court affect the reputation of the administration in the country. Such remarks are made only when we are constrained to do so. The case before us is one where there is a complete lack of understanding and fairness on the part of the Tax Department. The fact that Respondents have done nothing to solve the problem faced by the Petitioner, fueled with the adamant stand before us, contributes to skepticism of GST technical infrastructure, which we feel should and can be easily avoided. Only if Respondents were to engage with the taxpayers with a genuine intention to solve the problems, confidence in the system can be built up and such matters would not reach courts.”

It is high time for the department to find the solution to the problems with regard to TRAN-1. The Central Govt is talking about Make in India, Atmanirbhar Bharat etc. But the difficulties of the taxpayers remain unattended even after so many court orders! The limitation period of 3 years is ending on 30th June 2020. The taxpayers may be left with the following options now;

1. Writing the letter to the jurisdictional officer, the Nodal officer, IT Grievance Redressal Mechanism requesting them to open the portal or to accept manual TRAN-1.
2. Filing of writ petition before the jurisdictional High Court.
3. Informing the department that the transitional credit shall be taken through GSTR 3B and taking the credit in GSTR 3B. The department shall deny the

credit and follow the appeal route. The cost of interest, in the event of unfavorable order by the court should be borne in mind.

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