Certain Interesting Issues in Refund of Old Taxes vis-à-vis Transitional Provisions in GST Laws

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Introduction:

The transition to GST from erstwhile regime is quite a challenging one for the entire country. Though the transitional provisions contained in the GST laws have been substantially improved from the bill stage to the current stage, there is still vacuum prevailing, which is causing great hardship for the tax payers. The GST Council should take stock of all such aspects and provide appropriate relief, so that the tax payers are relieved from the burden of reaching the courts time and again. In this article, we have identified certain issues, which create a problem for the taxpayers.

Issue #1 – Refund of Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess:

The fate of closing balance of credits of education cess (for brevity 'EC'), secondary and higher education cess (for brevity 'SHEC') and Krishi Kalyan Cess (for brevity 'KKC') is quite an ambiguous one. The Madras High Court in the matter of Sutherland Global Services Private Limited[1], wherein it was clearly held that the credit of EC, SHEC and KKC would not attain the character of vested rights. On the other hand, the Bombay High Court in the matter of Godrej & Boyce Mfg. Co. Ltd[2], has set aside a show cause notice issued by Joint Commissioner on the ground that the Explanation 3 is not applicable to Section 140(1). Further, the validity of the amendment to Section 140(1) disallowing the transition of cesses was challenged in Grasim Industries Limited[3] before Gujarat High Court.

Amidst the above, the Tribunals were kind enough to grant the refund of EC, SHEC and KKC as refund placing reliance on the Supreme Court decision in Eicher Motors[4], the such a credit constitutes a vested right. The detailed article, whether the credit constitute vested right or not is available here,[5] and that subject is not the matter for current discussion. We shall see certain judgments where the Tribunals have granted the refund of old cesses.

The leading case on this issue is Bharat Heavy Electricals Limited[6], which is delivered by the CESTAT, New Delhi. The facts in the said matter were that appellant engaged in manufacture of electrical and mechanical equipment and they have been carrying the un-utilised credit balances in excise returns as on 30th June 2017 which is pertaining to the education cess (for brevity 'EC'), secondary and higher education cess (for brevity 'SHEC') and Krishi Kalyan Cess (for brevity 'KKC'). The appellant has moved the credit to GST regime except the credit pertaining to EC, SHEC and KKC on the pretext that such cesses are not eligible for carry forward since they stand abolished under the GST regime. They have claimed the refund of such credits which were not carried forward to GST regime. The refund sanctioning authority has rejected the refund claim stating that since there was no provision to carry

[1] [2020] 120 taxmann.com 295 (Madras)
[2] [2021] 132 taxamnn.com 82 (Bombay)
[3] [2019] 108 taxmann.com 285 (Gujarat)
[4] 1999 taxmann.com 1769 (SC)
[5] The Vires, Right & Retrospectivity - Transitional Credit
[6] [2020] 120 taxmann.com 363 (New Delhi – CESTAT)

over such cesses under GST regime and there was no provision to refund the same under the service tax/excise tax regime, the credits stands lapsed and cannot be refunded.

The Tribunal after hearing both the appellant and revenue has stated that, the appellant could not carry over the cesses under GST regime and accordingly appellants were not in a position to utilise the same and since the credit of cesses were a vested right in light of the Supreme Court judgment in the case of Eicher Motors and cannot be extinguished with the change of law unless there was a specific provision which would debar such refund. The Tribunal further stated that there is no provision in newly enacted law that such credits would lapse and hence, the vested rights cannot be taken away because of change in law. Accordingly, the tribunal held that appellant was eligible for claim of refund of such cesses.

The Tribunal clearly has not referred to other judgments on the matter, but completely placing reliance on the judgment of Supreme Court in the matter of Eicher Motors (supra) has allowed the refund of the cesses lying as on 30th June 2017. Though the appellant referred to the decision of Cellular Operator Association Of India[7] and tried to distinguish the same from the facts, the Tribunal in its concluding remarks has not made any reference to the said judgment nor directly upheld the view canvassed by the appellant. Hence, the judgment to this extent has to be taken with a pinch of salt.

In another matter in Schlumberger Asia Services Limited[8], the Chandigarh CESTAT has allowed the refund of EC, SHEC and KKC following the decision of Bharat Heavy Electricals Limited (supra), though the instant case, is different slightly on facts. In the instant case, the appellant has transferred his credit to the GST regime vide Section 140 of CT Act. When the law was amended with retrospective effect on 30.08.2018, putting an end to the controversy, whether certain credit of cesses can be taken forward to GST regime or not, the appellant has reversed the credit of cesses brought forward and applied for refund. A notice was issued to the appellant stating that he is not entitled to carry forward the credit in terms of Section 140 of CT Act. The Tribunal stated that since the Section 140 was amended on 30.08.2018, the appellant was not left with any choice except to apply for refund and accordingly held that refund is eligible, following the decision of Bharat Heavy Electricals Limited (supra). In another matter in Atul Limited[9], the CESTAT Ahmedabad has held that the closing balance of EC and SHEC as on 30th June 2017 stands eligible for refund for the fact that a notification has been issued in terms of 12/2015 allowing the usage of credit of EC and SHEC for payment of duty. In the matter of Emami Cement Limited[10], the refund of EC and SHEC were also granted following the decision of Bharat Heavy Electricals Limited (supra). In the matter of Bharat Heavy Electricals Limited[11], the CESTAT Hyderabad has allowed the cash refund of EC, SHEC and KKC.

From the above, it is evident that the Tribunals are granting refund of EC, SHEC and KKC under the GST laws, without examining, whether such cesses can be claimed as refund under the previous laws. The primary issue that was to be decided is, whether such cesses can be carried forward even under the previous laws, after the output cesses were stopped being levied. The next issue is that, if the same can be carried forward under the previous laws, whether they will be eligible for cash refund under

[7] WP (C) No. 7837 of 2016 dated 15.02.2018/2018 (2) TMI 1264 – Delhi High Court
[8] [2021] 127 taxmann.com 509 (Chandigarh – CESTAT)
[9] [2021] 132 taxmann.com 165 (Ahmedabad – CESTAT)
[10] 2022 (3) TMI 1254 – CESTAT New Delhi
[11] [2020] 115 taxmann.com 32 (Hyderabad – CESTAT)

the previous laws. Without answering the above questions, the Tribunals have stated that, since there is no particular provision prohibiting the grant of refund, the same can be allowed, requires revisit.

Issue #2 – Refund of Credit of Service Tax (Forward/Reverse Charge) under GST Regime using Section 142(3):

Section 142(3) allows claim of refund filed by any person, on or after the appointed day, for refund of any amount of cenvat credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of the existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than provisions of Section 11B(2) of Central Excise Act, 1944. The said section has two provisos. The first proviso states that where any claim for refund of cenvat credit is fully or partially rejected, the amount so rejected shall lapse. The second proviso states that no refund shall be allowed of any amount of cenvat credit where the balance of the said amount as on the appointed day has been carried forward under the CT Act.

Now, the question that would arise is, whether it is necessary that to claim refund under Section 142(3), whether such credits should satisfy the conditions that entails refund under the previous laws or any credits can be claimed as refund? The said question is not free from ambiguity. The High Courts seemed to be address the said issue in different manners. However, the Tribunals have granted the refunds under the said section without resorting to answering the question framed above. Let us explore the said judgments.

In the matter of Ganges International Private Limited & Others[12] – Madras High Court

The facts involved in one of the writ petitioner is that, the petitioner is engaged in provision of construction services under the erstwhile service tax regime. The last service tax return for period April 2017 to July 2017 was filed on 15.08.2017. An audit was conducted by the tax authorities and it was pointed out that petitioner is obliged to pay certain taxes under reverse charge mechanism for the period prior to GST regime. On being pointed out by the authorities, the petitioner has paid service tax along with interest. Since, the time limit for claiming the said credit under the GST regime vide TRAN-1 has exhausted by the time, the petitioner paid service tax, the same could not be moved to the GST regime. The petitioner believing that since the said credit is eligible under the previous law and if it would have been paid before the due date for filing the TRAN-1, then he would have taken such credit to GST regime, however, the due date for filing TRAN-1 being exhausted, has applied for refund under Section 142(3) of CT Act. The refund application was rejected stating that since there is no enabling provision under GST laws to allow such tax paid as credit or payment in cash. The said order was challenged before the High Court in the instant proceedings.

The Learned Single Judge of High Court after listening to both the parties, stated that the question involved is, whether the taxes paid pertaining to the previous regime after exhaustion of time for

[12] [2022] 136 taxmann.com 168 (Madras)

claiming them through TRAN-1 can be claimed as refund under Section 142(3)? The Court stated that Revenue's contention was that a claim of refund under Section 142(3) would only be possible if the petitioners would be eligible to seek such refund under the erstwhile regime. The revenue contended that since the taxes paid after 30th June 2017, the claim of credit itself is questionable much less the refund claim.

The Court stated that, considering the peculiar facts, a refund under Section 142(3) cannot be denied for taxes which were paid after the exhaustion of time limit for filing the TRAN-1. The Court by invoking the 'Doctrine of Necessity' allowed the refund claim under provisions of Section 142(3). The Court further held that, under the erstwhile law, since, the petitioners are not entitled to get any refund claim and their eligibility is confined only by taking the credit under Cenvat Credit Rules, beyond which, the relief cannot be stretched upon and moreover, the Cenvat Credit facilities which is a concession and if at all that concession has to be availed by the petitioners, that concession can be availed only in the manner known to law, for which, only credit facility can be adopted and therefore, the question of making any refund by way of cash under Section 142(3) does not arise. But at the same time, the Court stated that the petitioners application could have been considered by respondents under Section 142(3) for the purposes of taking the credit and such credit could have been considered and allowed for carrying forward in the electronic credit ledger which is nothing but different route than Section 140 and the Court concluded that is the only possibility for dealing with this kind of applications. Accordingly, passed order to examine the possibility for taking the said amount as credit instead of refund.

In the matter of Rungta Mines Limited[13] – Jharkhand High Court:

The facts of the instant case were that the petitioner herein was engaged in manufacture of excisable goods. The petitioner used to procure coal from place outside India and for importing coal, the petitioner availed input services such as 'port services'. The service provider has raised invoice for the services provided and petitioner has paid the value of invoice including service tax. However, the service provider has not issued the tax invoice for enabling the petitioner to avail the credit. In absence of the appropriate document, the petitioner was constrained not to avail the credit. Accordingly, the credit was not shown in the final ER-1 returns for want of original invoice. The petitioner has filed his last ST-3 return, wherein he has shown the credit of tax paid on port services to make sure his claim for the said credit is not lost. Though the petitioner knows that such credit should have been shown in ER-1 returns, since the service was received for manufacture of excisable goods, since he has no access to original bill, he could not show the same in ER-1 and if the same has also not been shown in ST-3 returns, he felt that the credit would be lost forever. The petitioner has not moved the said credit to GST regime vide TRAN-1, but filed an application for refund before the refund sanctioning authority. The authority has rejected the refund and accordingly the petitioner has approached the High Court seeking a writ of mandamus directing the lower authorities to sanction the refund of credit claimed.

The Court concluded that, the petitioner has failed to follow the prescribed procedure to avail such a credit and consequently having lost such a right, he cannot claim revival of such right and claim refund of the same by virtue of transitional provisions under Section 142(3). The Court stated that the petitioner had no existing right on the date of coming into the force of CT Act to avail credit of service tax paid on 'port services' as refund and accordingly the provisions of Section 142(3) cannot be

[13] 2022 (2) TMI 934 – Jharkhand High Court/ TS – 77 – HC (Jhar) – 2022 – GST

construed to have conferred such a right which never existed on the date of coming into force of CT Act. The Court stated that Section 142(3) does not confer a new right which never existed under the old regime except to the manner of giving relief by refund in cash if the person is found entitled under the existing law in terms of the existing law. The Court also held that Section 174 of CT Act read with Section 6 of General Clauses Act saves the right acquired, accrued or vested under the existing law and does not create any new right which never existed on the appointed day.

From the above, it is evident that both the High Courts have rejected the claim of refund stating that, they are not eligible for refund under the previous law and they cannot use Section 142(3) to take cash refund. The same was also evident from juxtaposing the provisions of Section 142(3) with 142(9)(b), where the later employs a specific usage of expression 'cenvat credit' alongside with refund, which does not appear in the former section. However, the Tribunals have not answered the said question, but proceeded to grant refunds. Some of the judgments which are directly contradictory to the judgments of the High Courts above are as under.

In the matter of NSSL (P) Limited[14], the Mumbai CESTAT has held that service tax paid under reverse charge mechanism can be claimed as refund under GST laws vide Section 142(3) of CT Act. In the facts, the appellant has belatedly paid service tax under reverse charge mechanism. The said credit was claimed in ST-3 returns. Consequent to change in law, the appellant has claimed refund of cenvat credit of service tax paid under reverse charge under the earlier law. The adjudicating authority has rejected the refund application stating that any claim from refund should be made under the CT Act and since the application was filed under the previous laws, the same was found to be rejected. When the matter went to Commissioner (Appeals), the Learned Officer has referred to provisions of Section 142(8)(a) for rejecting the refund applications. The Tribunal found that reference to Section 142(8)(a) is not appropriate in the facts of the case and found that appellant claim refund under Section 142(3). The Tribunal has come to this conclusion based on the assumption (which was stated in the judgment) that the credit of service tax paid under reverse charge was not disputed by the tax authorities.

The Tribunal has not examined, whether the provisions of Section 142(3) should be restricted to cases of refund which were allowed under the earlier laws or can be used for all types of credits, whether the same can be claimed as refund or not under the earlier laws. Under the earlier laws, the credit of taxes shall be refunded only under certain circumstances namely as specified under Rule 5 of Cenvat Credit Rules, 2004. Just because a credit is eligible, the same does not automatically result in refund of taxes under the earlier laws. It has to pass another test of eligibility to obtain the same as refund. Applying this to the current set of facts, the appellant was never engaged in export of goods or services to become eligible for refund. However, the same was not discussed by the lower authority or Tribunal, but held that since the credits are eligible, then they can be applied for refund under Section 142(3).

In the matter of Circor Flow Technologies India (P) Limited[15], the appellant has paid service tax under reverse charge on voluntary basis in March 2019 and claimed the same as refund under Section 142(3). The Tribunal referring to the provisions of Section 174 stated that when the liability of service tax continues even after implementation of GST laws, then the right to claim the same as refund also would continue. Since the said credit would be eligible for credit, the Tribunal stated that the appellant would be eligible for refund.

[14] [2021] 130 taxmann.com 55 (Mumbai – CESTAT)
[15] [2021] 133 taxmann.com 327 (Chennai – CESTAT)

In the matter of Jagannath Polymers (P) Limited[16], the appellant has paid service tax under reverse charge mechanism and claimed the refund of the same. The tax authorities rejected the refund stating that the tax was paid as a consequence of the audit. The Tribunal stated that the issue of payment of tax on ocean freight under reverse charge is quite debatable issue and since there is no malafide intention, the appellant is eligible for refund of said tax paid under Section 142(3).

Hence, it is important to clarify the scope of Section 142(3) to put rest to the above ambiguity. Further, if it clarified that the refund cannot be claimed, it is also required to be clarified, can the same be taken as credit as instructed by Madras High Court in Ganges International Private Limited & Others (supra).

[16] [2021] 133 taxmann.com 328 (New Delhi – CESTAT)