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By

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Dear Readers,

Greetings for the season!

Hope you are doing good and keeping you and your family safe in these times. Things are deteriorating than the position in previous months. In these times, I urge all of you to display a strong resilience which will support us to navigate through the tough times.

In this edition, we bring you two articles. The article on refund claim of transitional credit is quite an interesting issue. The second article is part of three article series which deals with the taxation of gains arising from alienation of shares of Flipkart Singapore by Tiger Global Holdings. I urge all the readers to read all the parts to comprehend the issue involved.

I hope that you will have good time reading this edition and please do share your feedback. I will also urge clients to mail us topics or issues on which you want us to deliberate in our future editions, so that we can contribute to the same.

Thanking You,

Suresh Babu S
Founder & Chairman

DIRECT TAXATION

INDIRECT TRANSFERS 2.0 – STUDY ON TAXABILITY OF GAIN ON ALIENATION OF SHARES - TIGER GLOBAL - PART I

Contributed by CA Suresh Babu S & CA Sri Harsha

Opening Remarks:

The acquisition of Flipkart by Walmart has attained considerable attention of media. The deal is to the tune US $ 16 Billion, making Flipkart as most valuable e-commerce marketplace in India. Now that the deal is done, the tax considerations/issues surface, one-after the other, the first being the issue of indirect transfers, which recently came up for consideration in the matter of Tiger Global. In this article, we shall deal with the recent judgment of Authority for Advance Rulings (for brevity 'AAR') in the matter of Tiger Global International II Holdings[1] . After setting out the ruling, taking this as a case study, we shall adventure to list out the favourable and adverse tax positions, position after MLI[2] and GAAR[3] .

Modus Operandi:

Before we proceed to discussion on the subject issue, we wish to bring to attention of the reader, that this article shall be dealt in three parts. Part I deals with the ruling of AAR with our concluding remarks. Part II deals with positions favourable and against the applicant when they challenge the order before High Court and Part III dealing with taxability under the PPT and GAAR.

The Facts:

The facts of the subject matter is Tiger Global International II Holdings, Tiger Global International III Holdings and Tiger Global International IV Holdings ('Tiger Global Holdings') are private limited companies incorporated in Mauritius. The companies were set up with a primary objective of undertaking investment activities with the intention of earning long term capital appreciation and investment income. The said companies are regulated by Financial Services Commission in Mauritius and have been granted a Category 1 Global License under the provisions of Financial Services Act, 2007 and are tax residents of Mauritius under the laws of Mauritius and qua the provisions of Double Taxation Avoidance Arrangement (DTAA) between India and Mauritius (Indo-Mauritius DTAA/ I-M DTAA).

Tiger Global Holdings collectively hold shares in Flipkart Private Limited, a private company limited by shares incorporated under the laws of Singapore (Flipkart Singapore). Tiger Global International II Mauritius holds 2,36,70,710 shares, Tiger Global International III Mauritius holds 22,82,825 shares and Tiger Global International IV Mauritius holds 1,05,928 shares in Flipkart Singapore which are acquired at various points in time. Flipkart Singapore holds shares in various Indian entities. The value of Flipkart Singapore is essentially derived from the value of various Indian entities in which it holds shares.

[1] 2020 (6) TMI 159 – Authority for Advance Rulings, New Delhi
[2] Convention on Multilateral Instruments
[3] General Anti-Avoidance Rules

As part of the boarder transaction of Walmart acquiring Flipkart, Tiger Global Holdings have sold the shares in Flipkart Singapore to Fit Holdings S.A.R.L, a company incorporated under the laws of Luxembourg. The gross consideration received by Tiger Global Holdings for the said transfer amounts to US $ 2.08 bn (INR 14,440 Crores).

Tiger Global Holdings had approached the Indian Tax Authorities under Section 197 of the Income Tax Act, 1961 (IT Act) seeking a certification of 'Nil' withholding prior to the consummation of the transfer. The tax authorities had informed that the Tiger Global Holdings were not eligible to avail benefit under I-M DTAA as they are not independent in their decision making and the control over decision making of purchase and sale of shares did not lie with them. The Tax Authorities passed an order under Section 197 prescribe a withholding rate in respect of sale of shares by Tiger Global Holdings to Fit Holdings S.A.R.L.

The Question:

Post such an order under Section 197 by the Tax Authorities, Tiger Global Holdings has approached the AAR on the question, whether, on the facts and in the circumstances of case, gains arising to Tiger Global Holdings, a company incorporated in Mauritius from the sale of shares held in Flipkart Singapore to Fit Holdings S.A.R.L would be chargeable to tax in India under IT Act read with I-M DTAA?

The Ruling:

The Revenue/Tax Authorities has raised objection for the allowing the application before the AAR invoking proviso to Section 245R(2). The proviso states that the AAR shall not allow the application where the question raised in application:

- Is already pending before any Income Tax Authority or Appellate Tribunal or any Court
- Involves determination of fair market value of any property
- Relates to a transaction or issue which is designed *prima facie* for the avoidance of tax

Is already pending before any Income Tax Authority or Appellate Tribunal or any Court:

The Revenue/Tax Authorities have argued that since the matter is pending with Income Tax Authority, the AAR cannot allow the application.The AAR after placing reliance on the decision of Honourable Supreme Court in the matter of Asagarali Nazarali Singaporawalla[4] stated that a legal proceeding is pending as soon as commenced and until it is concluded. Since, the application under Section 197 is disposed, the proceedings shall be taken as concluding and accordingly, the matter is held not pending with the authority as so to fall under the ambit of disqualifications which is provided in Section 245R(2). Accordingly, AAR has stated that there is no matter which is pending to make the application unheard.

[4] AIR 1957 SC 503

Involves determination of fair market value of any property

The Revenue/Tax Authorities have next argued that since the issue involves arriving the fair market value of shares of Flipkart Singapore is involved, the application cannot be allowed for admission. Tiger Global Holdings argued that the question involved in not qua the value on which tax has to be paid but whether tax has to be paid or not, which does not require determination of fair market value of shares and accordingly pleaded that the application can be allowed. The AAR has relied on the judgement of Mumbai AAR in Worldwide Wickets[5] and held that computation of capital gains is embedded in the concept of valuation of shares and merely for this reason the question of capital gains arising in application cannot be barred. Since the question raised by Tiger Global Holdings is on the aspect, whether gain arises in the first place or not and such an exercise does not involve determination of fair market value, the application on this ground cannot be disallowed.

Relates to a transaction or issue which is designed prima facie for the avoidance of tax

The major issue before the AAR and for this write-up is whether the application is barred for admission on the ground that the subject transaction is designed prima facie for the avoidance of tax. The Revenue argued mainly on four grounds to demonstrate that the transaction is designed prima facie for avoidance of tax and cannot be allowed. The four board grounds that Revenue took are on the aspects of ***Ownership Structure and Control, Decision Making, Financial Control and Beneficial Ownership***. Now, let us proceed to examine the key arguments made by Revenue and counter arguments made by Tiger Global Holdings on said aspects.

[5] 303 CTR 107 (AAR)

Issue	Revenue's Submissions	Tiger Global Holding's Submissions
On Ownership Structure and Control	• The Revenue stated that all companies were set up in Mauritius ostensibly for making investment into India and other markets. The said companies were not acting independently but only as conduit for the real beneficial owners based out of USA. • Notes to Financial Statements for year ending 31.12.11 states that the companies were held by Tiger Global Management LLC, USA (TGM USA) based investment that invests in public and private markets across the world through a web of entities based out of low tax jurisdictions in Cayman Islands and Mauritius, which indicated that the real control of the companies does not lie in Mauritius. • The Revenue also stated that on perusal of materials on the record, it prima facie appears that said limited partnership (LP), legally exempted limited partnerships, are default flow through entity for purpose of taxation and all profits directly flow to the partners in the ratio of their capital contribution or as defined in partnership deed. The limited partners, however, are not involved in the day to day business of the LP and it's the General Partner who manages the LP.	• Tiger Global Holdings argued that the allegation of the Revenue that the transaction was prima facie for avoidance of tax was grossly erroneous, lacked substance and wholly unsubstantiated. • Tiger Global Holdings stated that the transaction involved in the present application was sale of shares simplicitor undertaken between two unrelated independent parties which cannot be considered as being designed for avoidance of tax. • Tiger Global Holdings have placed reliance on the judgment of Honourable Supreme Court in the matter of Vodafone International Holdings BV[6] to emphasize that the onus was on the tax authority to demonstrate how such a design existed in each case. • Reliance on the ruling of the authority in the matter of Star Television Entertainment Limited[7] wherein it was held that a transaction cannot be designed for the prima facie avoidance of tax if there is business rationale surrounding the transaction.

[6] [2012] 347 ITR 001
[7] [2010] 321 ITR 001 (AAR)

	• The General Partner of TG Private Investment Partners V LP is TG PIP Performance V and its General Partner is TG PIP Management V Ltd which is in turn controlled by Mr Charles P Coleman. Also, management company for TG Private Investment Partners V LP and TG Private Investment Partners VI LP is TGM LLC, USA whose founder member is Mr Charles P Coleman. The Revenue submitted that from the date of inception the companies were part of TGM USA and its affiliates through a web of entities based out of Cayman Islands and Mauritius.	• The AAR has also extracted submissions made by Tiger Global Holdings before the Commissioner of Income Tax (CIT). For the allegation of CIT that Tiger Global Holdings had established tax residency in Mauritius only to take advantage of Indo-Mauritius DTAA and that the purpose of such residence was only to avoid paying taxes on returns earned by them, Tiger Global Holdings replied stating that board minutes extracts relied by CIT specifically notes that the Mauritius comprehensive tax treaty network with various countries (and not just India) facilitated efficient asset management and achieved a competitive return for them. The mere fact that they have applied for TRC in order to avail treaty benefits does not mean that a colourable device for tax avoidance was resorted to.
On Decision Making	• The Revenue based on the minutes of the meeting furnished by companies, it is stated that Mr Steven Boyd, non-resident USA director (who was also General Counsel of Tiger Global Management LLC) had attended all the Board Meetings in which crucial decisions were taken and the Mauritius Directors were in effect mere spectators or took advice from Mr Steven Boyd. • The Revenue also states that Mr Steven Boyd or one of the representatives of TGM, USA was always present to advise the Board of all the companies which held shares in Flipkart Singapore. The other directors based in Mauritius were mere puppets and not independent. The companies decision making was fully subordinate and placed reliance on the decision of Supreme Court in the matter of Vodafone International Holdings BV[8] .	• For the allegation of CIT that based on the facts it can be established beyond doubt that the control of funds lies outside Mauritius in the hands of TGM USA, Tiger Global Holdings replied that the CIT has failed to adduce even a single fact or lead any evidence whatsoever in support of the allegation. The mere fact that the Board of Directors have given a limited authorization to certain persons to operate the bank account does not ipso facto mean that they did not have control over its funds. Tiger Global Holdings further stated that the not a single fact has been adduced by CIT to disprove the submission that the funds invested by them as well as sale proceeds received by them from transaction were legally and beneficially owned by them in sole, independent and exclusive capacity.

[8]341 ITR 001

On Financial Control	• The Revenue stated that the authority to open bank account for transactions above US $ 2,50,000 lies with Mr Charles P Coleman countersigned by one of the Mauritius Directors and also stated that it has noted that Mr Charles P Coleman is not on the Board of Directors of any of the companies that hold shares in Flipkart Singapore and his presence is not noted in any of the minutes of the meeting where apparently crucial decisions regarding investments were taken. • The Revenue submits that without being on boards, Mr Charles P Coleman yields maximum authority in controlling the funds of the companies. The other signatories are Mr Steven Boyd, Mr Michael Germino and Mr Anthony Armenia with either of two categories of signatories countersigned by one of the Mauritius based directors. The non-Mauritius based signatories are again senior management personnel of TGM, USA. The Revenue also submitted that Mr Steven Boyd is on Board of Directors of the companies as a non-resident based out of USA.	• For the allegation that the corporate disclosures state that Mr Charles P Coleman was the beneficial owner. Tiger Global Holdings stated that the mere fact that certain disclosures were made and maintained for Mauritius corporate law purposes does not ipso facto mean that the legal owner does not enjoy benefits of the shares in his independent capacity for income tax purposes, unless clear facts are brought on record to demonstrate otherwise. They have further stated that the logic canvassed by Revenue if applied would result in absurdity leading to a situation whereby no Indian company with foreign shareholders would ever be able to claim treaty benefits in India. • Finally, Tiger Global Holdings pleaded that the holding structure was of no relevance and the transaction was not prima facie found to be designed for avoidance of tax. They contend that the CIT has deemed the holding structure to be ipso facto determinative of whether the transactions was designed for the avoidance of tax which was not the standard to be applied to invoke clause (iii) of proviso to Section 245R(2). They have contended that it must be proven that the transaction itself and not the structure of the entity undertaking the transaction was designed for avoidance of income-tax in order to invoke the above proviso.

	• Though some of the resident directors were made the authorised signatories for bank account operation, the Revenue contended that Mr Charles P Coleman continued to be authorised signatory along with Mr Anil Castro, both of whom are not on Board of Directors of Tiger Global Holdings and are in fact key personnel of TGM USA. Any transaction above USD 2,50,000 required either 2 signatories from Group A or one each from Group A and Group B. That is to say, the person listed in Group A had the ultimate control over the founds of the Tiger Global Holdings. The Revenue contended that above facts establish beyond doubt that the control of funds lies outside Mauritius in the hands of Tiger Global personnel based out of USA.	• Tiger Global Holdings stated that it was managed and controlled of its Board of Directors in Mauritius in accordance with its constitution. The decision to invest into and ultimately sell the shares of Flipkart Singapore was taken by Directors of Tiger Global Holdings after proper discussions and deliberations. The shares were held by them and were not accountable to any third party and they were neither sham entity nor a conduit company and that the treaty benefit being claimed cannot be measured as tax avoidance.
On Beneficil Ownership	• The Revenue stated that on bare perusal of documents submitted by Tiger Global International III Holdings with Mauritius Financial service commission for the purposes of obtaining Category I Global Business License, it is found that the applicants itself has clearly specified the Beneficial Owner of the company as Mr Charles P Coleman.	

The AAR after hearing both the parties has stated that tax avoidance itself is not illegal per se. In the scheme of tax avoidance, the taxpayer discloses all the relevant facts to tax authorities and claims benefit as provided under the law. The tax avoidance may be considered as legal as the transactions are so planned that relief is obtained even though it was not as per the intent of lawmakers. Then, AAR proceeded to examine as to whether the transaction or the issue raised by Tiger Global Holdings in the present application was designed prima facie for availing the benefit which may appear to be correct but was not intended by lawmakers.

The AAR based on the findings of Honourable Calcutta High Court in the matter of Hela Holdings Private Limited[9] summarised the differences between tax evasion and tax avoidance. The AAR stated that contention of Tiger Global Holdings that the subject sale of shares simplicitor is too simplistic to be accepted. The capital gain is not dependent on mere sale of shares. Since in order to arrive the capital gains, the cost of acquisition has to be reduced from the sale price and therefore, in the mechanism of

[9] 263 ITR 124

capital gains computations what is relevant is not only the sale of shares but also purchase of shares. Hence, AAR stated that, it is imperative for them to look at the entire transaction of acquisition as well as sale of shares as a whole and adoption of dissecting approach by examination of sale of shares alone is not appropriate.

The AAR further stated that from the notes to the Financial Statements, it is evident that the principal objective of Tiger Global Holdings was to act as investment holding company for a portfolio investment domiciled outside Mauritius. **The investment in Flipkart Singapore which has an Indian subsidiary, was with a prime objective to obtain benefits under the double taxation treaty between Mauritius and India and between Mauritius and Singapore.** Tiger Global Holdings is part of TGM USA and have been held through its affiliates through web of entities in Cayman Islands and Mauritius. Though holding-subsidiary structure might not be a conclusive proof for tax avoidance, **the purpose for which the subsidiaries were set up does not indicate the real intention behind the structure. The fact that the Tiger Global Holdings were set up for making investment in order to derived benefit under the DTAA between Mauritius is an inescapable conclusion.**

The AAR stated that the next aspect that has to be considered is the control and management of Tiger Global Holdings. Though it was pleaded that the control and management was with the Board of Directors in Mauritius, the AAR stated that what is material is not routine control of the affairs but their overall control, which would mean the head and brain and then proceeded to examine, whether the head and brain of Tiger Global Holdings was in Mauritius. On the powers to Mr Charles P Coleman as signatory of cheques above a particular limit, the AAR stated that it would have made sense if a local person based in Mauritius was appointed to sign the cheques on behalf of the directors. The AAR stated that Tiger Global Holdings have not provided any explanation as to why Mr Charles P Coleman, who was not based in Mauritius was appointed to sign the cheques of Mauritius bank account. The AAR stated that in view of the above facts the appointment of Mr Charles P Coleman as authorised signatory of bank cheques above a limit cannot be considered as mere coincidence. The AAR brushed away the stand taken by Tiger Global Holdings that giving authorisation to operate bank account to a person does not ipso facto mean that they do not have control over the funds by stating that the authorisation was not given to a certain person but to Mr Charles P Coleman, whose influence over the group is evident. The AAR further stated that from the evidences brought on record, it is evident that the Tiger Global Holdings were ultimately controlled by Mr Charles P Coleman and apparently the decision for investment or sale was taken by Board of Directors but the real control over the decision of any transaction over a limit was exercised by Mr Charles P Coleman and accordingly concluded the head and brains of Tiger Global Holdings was situated not in Mauritius but in USA. The AAR further stated that the holding structure coupled with prima facie management and control of the holding structure, including the management and control of Tiger Global Holdings, would be relevant factors for determining the design for avoidance of tax. The real management and control of the Tiger Global Holdings was not with their respective Board of Directors but with Mr Charles P Coleman, the beneficial owner of the entire group structure and concluded that the Tiger Global Holdings were only a 'see-through entity' to avail the benefits of India-Mauritius DTAA.

The AAR alsostated that what was covered under Article 13 of India-Mauritius DTAA is gain arising on alienation of shares of Indian company and not a Singapore company. Hence, for the gain arising on sale of Flipkart Singapore, the Tiger Global Holdings could not seek for the benefit under India-Mauritius DTAA, since shares of Singapore company are not covered in the said treaty and on merits too the case fails. The AAR also brushed away the stand taken that the whole transaction has to be seen for tax avoidance and if it is established that Mauritian company was interposed as a device, it was open to tax department to discard the device and take into consideration the real transaction by stating that the financial statements of Tiger Global Holdings does not reveal any other investments except Flipkart Singapore. Thus, the real intention was to avail the benefits of India-Mauritius Treaty was concluded by AAR. The AAR also brushed away the yardsticks as postulated by Honourable Supreme Court in Vodafone International Holdings BV and relied by Tiger Global Holdings by stating that the foreign direct investment in the subject case has not reached India but to Singapore and accordingly all other yardsticks would not come into play. Finally, the AAR concluded stating that though the shares of Flipkart Singapore substantially derive their value from the assets located in India, the fact remains that the shares sold were belonging to Singapore company and not Indian company and accordingly the benefit of India-Mauritius DTAA would not apply and the issue involved was designed prime facie for avoidance of tax and hence cannot be entertained by them.

Our Comments:

From the above, it is evident that the AAR has rejected to entertain the application on the ground that the transaction is designed prima facie for avoidance of tax. Though the AAR has referred to the judgment of Honourable Supreme Court in the matter of Vodafone International Holdings BV (supra), in our view the rationale was not correctly applied to the Tiger Global Holdings matter. The AAR made reference to the

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GST

ARTICLE ON REFUND CLAIM OF TRANSITIONAL CREDIT

Contributed by CA Sri Harsha & CA Manindar

Introduction:

Whether the credit accumulated in the last returns filed under the previous regime can be taken to electronic credit ledger in terms of section 140 of the CT Act[1] by filing TRAN-01 even after the time limit prescribed under Rule 117 of the CT Rules[2] has been subjected to vexatious litigation and has caught the Nation's attention with contrary decisions of various High Courts and the retrospective amendments to Section 140. The matter has finally landed before the Honourable Supreme Court[3] . Read our extensive analysis on the above matter at https://bit.ly/3jPIKun.

On the other hand, another issue related to credit of previous regime which is annoying the exporters is whether they are entitled to claim refund of the credit of the erstwhile regime that was carried forward into electronic credit ledger by filing TRAN-01 i.e. TRAN credit.

CBIC[4] vide their Circular No. 125/44/2019-GST dated 18.11.2019[5] clarified that the TRAN credit is not of the nature of accumulated credit under the GST laws and the same cannot be claimed as a refund against exports undertaken under LUT[6] without payment of IT[7] .

In this backdrop an attempt is made in this article to examine the legal validity of the said clarification given by the circular and whether such clarification will also hold good even in case where refund claim was filed in cases where exports are undertaken with payment of tax.

Refund Options under GST Law:

Before we address on the validity of the clarification, let us understand the refund process available to the exporters under the GST law. In terms of section 16 of the IT Act[8] , the goods or services exported outside India are considered as zero-rated supplies. Sub-section (3) of the said section provides that the person making zero-rated supply shall be eligible to claim there fund of input taxes in either of the following manners:

- The supplier may supply the zero-rated supplies under bond or LUT without payment of IT and claim the refund of the unutilised input tax credit (This is referred to as Option I henceforth).

- The supplier may supply the zero-rated supplies on payment of IT and later on claim refund of the IT paid on these supplies (This is referred to as Option II henceforth).

[1]Central Goods and Services Tax Act, 2017
[2]Central Goods and Services Tax Rules, 2017
[3]Union of Ind vs Brand Equity Treaties Limited, 2020(6) TMI 517-SC Order
[4]Central Board of Indirect Taxes and Customs
[5]Superseded the earlier Circular No. 37/11/2018-GST dated 15.03.2018 which also had similar restriction
[6]Letter of Undertaking
[7]Integrated Tax
[8]Integrated Goods and Services Tax Act, 2017

Under the Option I, no tax is being paid on the goods or services exported. Further, the input taxes paid on the input goods or services procured and used for the purpose of exporting the output goods or services shall be refunded. While no tax is being paid on output and the input taxes paid are allowed to be claimed as refund, the exports are made zero-rated without any tax burden on the exporter.

Under the Option II, tax is required to be paid on the output goods or services exported. However, while paying the tax[9] , the input tax credit accumulated on the input goods or services or capital goods[10] procured and used for the purpose of exports will be used. By setting off the input tax with output tax and claim of such output tax paid as refund will render the exports zero-rated without any tax burden on the exporter.

Clarification of the CBIC Circular:

With the above understanding of the two types of refund options enshrined under the GST law for exporters to claim refund of the tax paid by them, we will now proceed to understand the clarification given by the circular that the TRAN credit cannot be claimed as refund by exporters. The said clarification is given with respect to Option I and is silent about the claim under Option II. The relevant extracts of the circular are reproduced as under:

*50. Refund of unutilized input tax credit is allowed in two scenarios mentioned in sub-section (3) of section 54 of the CGST Act. These two scenarios are zero rated supplies made without payment of tax and inverted tax structure. In sub-rule (4) and (5) of rule 89 of the CGST Rules, the amount of refund under these scenarios is to be calculated using the formulae given in the said sub-rules. The formulae use the phrase 'Net ITC' and defines the same as "input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both". **It is clarified that as the TRAN credit pertains to duties and taxes paid under the existing laws viz., under Central Excise Act, 1944 and Chapter V of the Finance Act, 1994, the same cannot be said to have been availed during the relevant period and thus, cannot be treated as part of 'Net ITC' and thus no refund of such unutilized TRAN credit is admissible.***

(emphasis supplied by us)

[9]A general misconception is that the payment being mentioned in Option II as payment of tax in cash. It is to be noted that payment of tax in cash would not release the accumulated credit in any manner. Hence, the payment used in Option II has to be understood that payment being made in credit.

[10]There is no restriction for claiming the credit of tax paid on capital goods in Option II. This is also clarified by CBIC in one of its circular, while dealing with invoices to be submitted under both the options. Whether this is a conscious decision or accidental mistake is not known, but it clearly discriminates Option I on this ground. In our view, capital goods should be allowed or not to be allowed under any of method, but not allowed under one method and allowed under the other method. Since the intention of the government is not to export taxes but only services/goods, the credit of capital goods should be allowed in any method. However, this is not the aspect of present deliberation.

Validity of the Circular for Refund Claim under Option I:

Rule 89 of the CT Rules provide for the procedure under which refund claim is to be filed by exporter to claim refund of the accumulated input tax credit. The above clarification of CBIC is based on the reasoning that the TRAN credit does not fit into the meaning of 'Net ITC' as defined under Rule 89. The said rule provides for the manner and procedure which restricts the claim of refund only to the credit accumulated on inputs and input services. Sub-rule (4) of this rule provides that the refund of accumulated credit on account of zero-rated supplies shall be granted as per the formula prescribed therein. The extracts of this formula and the relevant explanation given for the phrase 'Net ITC' is reproduced as under:

Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷Adjusted Total Turnover

*(B) "Net ITC" means **input tax credit availed on inputs and input services during the relevant period** other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both*

In terms of the above formula prescribed, refund of accumulated credit shall be granted in proportionate to turnover of zero-rated supplies to the total adjusted turnover. Further, the formula provides that the ratio of turnover related to zero-rated supplies to total turnover shall be applied on 'Net ITC'. The said term 'Net ITC' has been defined to mean the input tax credit availed on inputs and input services during the relevant period.

Further, the term 'relevant period' has also been defined in Rule 89(4) of the CT Rules as the period for which claim has been filed which could only mean that any period during the GST regime. It is in view of this reason; the circular has concluded that the TRAN credit cannot be considered as input tax credit claimed during the relevant period.

With the above understanding of reasons given by the CBIC Circular in denying the refund of TRAN credit, let us understand the term 'input tax credit' as defined vide Section 2(63) of CT Act to mean 'credit of input tax'. The expression 'input tax' is defined vide Section 2(62) to mean, CT, ST[11] , IT or UTT[12] charged on supply of goods or services or both made to him and includes taxes paid under reverse charge and excludes composition levy.

By placing reliance on these definitions, the CBIC has taken a view that the TRAN credit claimed by an exporter would not come within the ambit of the input tax credit to fit under the expression 'Net ITC' to claima refund under Option Ion a reasoning that 'input tax' and 'input tax credit' are defined to mean and include taxes that are levied under GST laws but not those that are in the nature of TRAN credit.

However, considering the overall scheme of the GST laws and other provisions of the GST laws, we understand that such interpretation leads to absurdity and is required to be liberally interpreted to include TRAN credit also within their scope. Our reasoning for the view that TRAN credit is also in the nature of 'input tax' is detailed hereunder, on three counts, namely, credit once moved to GST regime would be 'input tax', interpretation of section 49(5) of CT Act and interpretation of Section 142(4).

[11]State Tax
[12]Union Territory Tax

TRAN Credit = Input Tax Credit:

In terms of section 140 of the CT Act, the credits pertaining to central excise and service tax are permitted to be carried forward into the GST regime as central tax. Similarly, under the corresponding section under ST Act, the credit pertaining to VAT[13] and entry tax are permitted to be carried forward into the GST regime as state tax. Therefore, considering the provisions of section 140 under CT Act and the corresponding ST Act, we understand that the TRAN credit brought forward into GST regime would acquire the nature of central tax and state tax, as the case may be. This is evident from the fact that these credits are reflected in electronic credit ledger maintained in GST portal under CT and ST columns.

Further, as per the provisions of section 140 read with Rule 117, the TRAN credit is required to be taken into electronic credit ledger on or before prescribed due date for filing the form TRAN-01. Upon filing of TRAN-01, the credit will be available in the electronic credit ledger account maintained in the GST portal for the month in which such TRAN-01 is filed. This process will aid in arguing that TRAN credit is also a credit claimed during the relevant period during which TRAN-01 is filed to come within the purview of 'Net ITC' as defined in Rule 89.

Understanding TRAN Credit in hue of Section 49(5):

Further, the above interpretation draws support from the provisions related to payment of tax under section 49 of the CT Act. The manner in which input tax credit accumulated in electronic credit ledger shall be used against payment of output tax has been provided under sub-section (5) of section 49.

Under this sub-section (5), the manner of utilisation of input tax credit with the output tax liability has been provided. The input taxes referred for set-off with output tax liability are CT, ST, IT and UTT alone. Based on literal interpretation of the language of the definitions of 'input' and 'input tax credit' as reproduced above, if a view is taken that these terms do not cover TRAN credit carried forward under CT Act and corresponding ST Act, then it leads to an absurd interpretation that section 49 has not provided for the manner of utilisation of TRAN credit for set-off with output tax and therefore TRAN credit cannot be set-off with output tax. This was never the intention of the statute and this would render the whole benefit given by way of TRAN credit as otiose.

Considering the whole object of the GST laws and the absurd results that may cause if the definition of the terms 'input' and 'input tax credit' are understood not to include TRAN credit carried forward as central tax or state tax, we differ with the view expressed by the CBIC in the above circular.

Interpretation of Section 142(4):

Further, it is worth to refer to the transitional provisions of section 142(4) relating to claim of refund under the erstwhile tax laws which are reproduced as under:

(4) Every claim for refund filed after the appointed day for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after the appointed day, shall be disposed of in accordance with the provisions of the existing law:

[13]Value Added Tax

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:

Provided further 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 this Act

Section 142(4) of the CT Act facilitates the refund of CENVAT Credit in connection with exported goods or services if such claim has been filed under the previous laws before or after the appointed day[14] . Such claim shall be processed in accordance with the provisions of the previous laws. The first proviso provides that in a case where the claim for refund of CENVAT Credit is fully or partially rejected, the rejected amount will get lapsed and there cannot be any scope to carry forward of such rejected amount into the GST regime. On the other hand, the second proviso to the said sub-section provides that no refund of CENVAT Credit amount shall be allowed if the said amount was carried forward into GST regime.

In simple words of Section 142(4), the CENVAT credit (that is the TRAN credit) can be claimed as refund under the provisions of previous laws[15] , despite of the fact that ***such credit is used for export of goods or services post appointed day.*** The mention of export of goods or services post appointed day creates confusion and generates two contradictory interpretations. First, we shall deal with the line of interpretation which favours the current argument that TRAN credit is akin to the input tax credit. Later, we shall explore the second line of interpretation.

The usage of phrase 'in respect of goods or services export before or ***after the appointed day'*** in subs. (4) can be understood that, the said provision is merely dealing in accommodating claiming of refund of credits which are involved in transitional phase. Say in case of export of goods, the goods are removed from the factory prior to the appointed day and are shipped with let export order after the appointed day. Similarly, in case of services, the invoices are issued prior to the appointed day and the export proceeds are realised after the appointed day.

In view of the reason to facilitate refund claim for the exports initiated as per the provisions of existing law, the provisions of section 142(4) has provided that the refund claim of taxes paid towards such goods or services exported during the transitional phase either prior to or after the appointed day as per the provisions of the existing law. Further, as the main provision is dealing with 'refund' under the existing law, the second proviso should also be interpreted to be denying the 'refund' claim of CENVAT Credit under the existing law only and not under GST law if the same has been carried to the GST regime.

The second line of interpretation is completely in contradiction with the above view, which we shall detail now. Section 142(4) of the CT Act facilitates the refund of CENVAT credit in connection with exported services if such claim has been filed before or after the appointed day. Such claim shall be processed in accordance with the provisions of the previous law. The first proviso provides that in a case where the claim for refund of CENVAT Credit is fully or partially rejected, the rejected amount will get lapsed and there cannot be any scope to carry forward of such rejected amount into the GST regime. On the other hand, the second proviso to the said sub-section provides that no refund of CENVAT Credit amount shall be allowed if the said amount was carried forward into GST regime.

[14]The day on which GST Laws are brought into force i.e. 01.07.2017.

[15]Central Excise Act, 1944 or Finance Act, 1994, depending upon export of goods or services, as the case may be

Thus, in view of the above transitional provisions related to refund claim, the law expressly states that refund of any tax or duty paid under the existing law which are used for exports before or after the appointed day, shall be disposed in accordance with the provisions of existing law. Hence, the refund of any service tax or central excise, which was used for export of goods/services before or after the appointed day has to be filed on the basis of provisions of the existing law.

Since the due date for filing refund of credit of service tax paid on input services which are used for export of services (either before or after the appointed day) exhausts within one year[16] from relevant date of export, the refund for such credit of such tax cannot be filed now. Even filed the same would be disposed as time barring and resultantly such credit would get lapsed under the first proviso to Section 142(4).

Since the refund of service tax/excise duty is to be claimed only under the provisions of the existing law, there cannot be any refund claim under the new law for the said credit. The operative part of the section has made clear the same by using the phrase '... **goods or services before or after the appointed day**...'. If the phrase used only for the goods or services before the appointed day, then there would be a scenario to explore the possibility of claiming refund under the GST laws for the services exported under GST laws. In absence of such position, the claiming of refund of TRAN credit under GST laws is not possible.

Therefore, doubt exists about the claim of TRAN Credit as refund under the GST law by considering the provisions of section 142(4) of the CT Act. However, it is also worth to note that CBIC has not referred to these provisions as a reason to deny the refund claim of TRAN credit under Option I.

Summing up the discussion on the possible contradiction to the interpretation adopted by CBIC and how the provisions of section 142(4) of the CT Act with respect to the refund claim of TRAN Credit are prone to different interpretations, the claim of refund claim under Option I requires strict legal examination.

Considering the clarification given by CBIC, the application form prescribed for claiming refund in form GST RFD-01A is made available in GST portal with an inbuilt control that no refund of TRAN credit can be claimed under Option I. Technically as on date, no exporter is in a position to claim refund of the TRAN credit under Option I by filing the required application in GST portal.

Taking into consideration the above discussed legal implications on refund claim of TRAN Credit under Option I, we will now proceed to examine the possibility of such refund claim under Option II.

Validity of the Claim under Option II:

As discussed above, in terms of section 16(3) of the IT Act, the refund of input taxes paid towards export of goods or services can be claimed by paying IT on the value of the goods or services exported. The applicable IT can be paid by using accumulated ITC. Rule 96(9) of the CT Rules provides for refund claim of the IT paid on export of the goods or services. The said rule also provides that the refund claim shall be filed and claimed in accordance with the procedure prescribed under Rule 89.

[16] In terms of section 11B of the Central Excise Act, 1944

Thus upon the combined reading of the provisions of section 16(3) of the IT Act, Rule 96 and Rule 89 of the CT Rules, in a case where goods or services are exported with payment of IT, the refund can be claimed as per the procedure prescribed under Rule 89. While making the tax payment on the services exported, credit can be used. There is no express restriction in any of the provisions of the GST law that the TRAN credit cannot be used for payment of IT on the goods or services exported.

However,in such cases where TRAN credit was used payment of tax on exports, there is a great probability that the department officers may deny the refund claim under Option IIconsidering the contrary position taken by CBIC under Option Iby applying the legal principle 'expressio unius est exclusio alterius' i.e. the expression of one thing is the exclusion of the other.

This implies that clarification given under circular with respect to Option Iprovide that the taxpayer is barred from claiming refund of TRAN credit under GST regime and thereby the said claims under Option IIis also not permissible. Further, the interpretation associated with the transitional provisions of section 142(4) of the CT Act might also come as an obstacle to claim of refund of TRAN credit.

However, in light of the above discussion, the paper writers are of the view that issue involved is well balanced and is undoubtedly lead to a close fight between the exporters and the tax authorities in the courts of law. Any exporter caught in this tangle by inadvertent carry forward of their TRAN credit into GST is left with no option but to fight by claiming refund claim under Option II.

Conclusion:

Basis the above discussion, we doubt that the reasoning given by CBIC in their Circular to deny the exporters the refund claim of TRAN credit under Option I may not legally withstand. Further, as discussed above, interpretation associated with section 142(4) of the CT Act would also assume significant influence on this issue. These provisions can be challenged in the courts. Unlike the first Option I, except the provisions of section 142(4), no other provision of the GST law is contrary to the refund claim of such TRAN credit under Option II by undertaking exports by paying IT. Further, the portal is also not prohibiting the exporter to claim refund of TRAN credit under this option. Therefore, instead of blocking their TRAN credit ideally in their electronic credit ledger, an exporter can venture out to claim refund under Option II and seek the appellate remedies available to him in case the said claim is rejected by the department officers by relying on the impugned circular given with respect to Option I or based on the provisions of section 142(4).

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