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Research Paper

Opening of Portal for Filing of TRAN forms

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Research Paper on
"Opening of Portal for Filing of TRAN forms"

Background:

On 1st July 2017 the historic Indirect Tax Reform - GST was introduced which subsumed multiple Indirect Taxes such as Excise Duty, Service Tax, VAT, CST etc.

One of the strong points of GST was the elimination of cascading effect in the erstwhile regime as it offered a comprehensive and continuous chain of tax credits from the supplier's point up to the Consumer's level thereby taxing only the value added at each stage of supply chain.
However, question arises about the Tax Credits lying unclaimed with the taxpayer's immediately preceding the appointed day i.e., 1st July 2017?

As GST consolidated multiple taxes into one, it was very essential to have Transitional Provisions.
The GST Act contains within it repealing enactments, which required carefully worded transitional provisions to ensure a smooth change in the legal regime and to ensure there is no impact on existing rights and liabilities along with taking care of the events during the period of **transition**.

The provisions contained in Chapter XX of CGST Act,2017 were beneficial for taxpayers to allow easy transition however few transitional glitches impaired its effective implementation.
Let's dive into the Transitional Provisions contained in the CGST Act.

Relevant Provisions of GST Law:

The Statutory provisions applicable to Transitional Credit are provided in Chapter XX (Section 139 to 142) of CGST Act, 2017, SGST Act(s), 2017 and applicable rules are 117, 118, 119, 120, 120(A) and 121 of CGST Rules, 2017. To avail the benefit of Transitional Credits, the taxpayers were required to furnish their details in Form TRAN-1, TRAN-2 and/or as the case may be, in TRAN-3.

Out of the 4 Sections the most significant is Section 140 which has been amended twice with retrospective effect and prescribes entitlement to carry forward credit from returns filed in erstwhile regime, while Rule 117 prescribes the form and time limits for carry forward of credit.

The 4 Sections provide:

Section 139 – Migration of existing taxpayers.

Section 140 – Transitional arrangements for input tax credit.

Section 141 – Transitional provisions relating to job work.

Section 142 – Miscellaneous transitional provisions.

Section 140 & Rule 117 of the CGST Act, are in their own sense packers and movers of the eligible credits of the taxpayers from the erstwhile regime to the new GST regime.

Section 140 drives through the aspects of what are the different categories of eligible credits that can be taken forward to the new regime but the method to avail the credit under the new regime has been prescribed in Rules 117 to 120 primarily under Rule 117.

The relevant rule prescribes the time limit for availing Transitional ITC by carrying it forward from the credit balance under tax legislations which have been repealed and replaced by the CGST Act.

Section 140. (1) - *A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of* ***eligible duties*** *carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law within such time and in such manner as may be prescribed:"*

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely: —

1. *where the said amount of credit is not admissible as input tax credit under this Act; or*
2. *where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or*
3. *where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.*

The transitional provisions of Section 140(1) allow a registered person to claim the CENVAT Credit carried forward in the last return under the erstwhile regime subject to certain conditions such as the credit should be admissible under the GST Regime and filing of all the returns for the period January 2017 to June 2017 i.e., six months immediately preceding the appointed date.

It presupposes that the amount of CENVAT credit of eligible duties has therefore accrued and is existing and reflected in the CENVAT credit register.

Section 140 (1) was amended twice with retrospective effect:

i. The words "of eligible duties" was inserted after the letters and word "CENVAT credit" (vide CGST (Amendment) ACT, 2018) with retrospective effect from 1st July 2017.

ii. The words "within such time and" was inserted after the letters and word "existing law" (vide CGST (Amendment) ACT, 2018) with retrospective effect from 1st July 2017.

The term "eligible duties" is defined in Explanation 1 to Section 140 as follows:

"Explanation 1. -For the purposes of 10[sub-sections (1), (3), (4)] and (6), the expression "eligible duties" means-

(i) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975);

(iv) [omitted]

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986); and

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001 (14 of 2001),

in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day."

In short, Section 140 of the CGST Act read with Rule 117 of the CGST Rules enables a registered person to carry forward the accumulated credit under erstwhile tax legislations and claim the same under the CGST Act. In effect, it is a transitional provision as is evident both from Section 140 and Rule 117.

Section 140(2) - Capital Goods credit which has not been availed in the earlier Law

In the erstwhile regime, under CENVAT Credit Rules, the credit in respect of Capital Goods was made available in instalments, so if any Capital Goods were purchased before the appointed date i.e., 01st July 2017 and any portion of the credit had remained unavailed the same can be claimed in the GST regime by filing Table 6 of TRAN -1.

Therefore, transition provisions of Section 140(2) deal with the unavailed portion of CENVAT Credit in respect of Capital Goods under the erstwhile laws provided such credits are admissible under the GST laws. Rule 117(2)(a) of CGST Rules, 2017 specify the particulars required regarding unavailed credit to be filed on the Common Portal.

Section 140(3) – Credit of inputs in Stock under certain circumstances

The credit is available to following registered persons:

i. who was not liable to be registered under the existing law
ii. who was engaged in the manufacture of exempted goods or provision of exempted services
iii. who was providing works contract service or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer.

The credit of eligible duties is available in respect of:

i. inputs held in stock
ii. inputs contained in semi-finished or finished goods held in stock

on the appointed day subject to various conditions mentioned therein.

For Example: Small Scale Industry (SSI) Exemption under Central Excise had threshold limit of 1.50 Crores and that a dealer in the erstwhile regime wouldn't have taken any credit whereas in GST the threshold limit is at 20 Lacs, now in this scenario the dealer would be having certain inputs of purchases made earlier in the form of either lying as such or contained in work in progress or contained in finished goods and the taxes paid in respect of these inputs would be eligible credit as when the dealer would be selling the goods under GST regime he would be charging GST on these goods.

Section 140(4) -

A registered person undertaking both taxable as well as exempted activities (be it of manufacturing or providing services) in the erstwhile regime and which are now liable to be taxed under GST,

i. Eligible credit already availed must be carried forwarded as per Section 140(1)
ii. Credit which was not availed, can be availed under Section 140(3)

Section 140(5) – Transitional Credit of Goods and Services in Transit

This section deals with credit of eligible duties and taxes with respect to inputs or input services received on or after the appointed date provided the said transactions are recorded in books of account within 30 days from the appointed date i.e., 01st July'2017.

Section 140(6) – Tax at Flat rate or Fixed Amount in the earlier regime

This section deals with the cases where the tax was being paid by the registered person in the earlier regime but corresponding credit was not available. Credit can be claimed of inputs lying as such or contained in work in progress or contained in finished goods and such inputs are used or intended to be used for making taxable supplies.

The conditions for the claim of credit are that the said registered person is in possession of invoice evidencing payment of duty under the existing law and that such invoice is issued not earlier than twelve months immediately preceding the appointed day i.e., 01st July'2017

Section 140(7) – Transitional Credit for Input Service Distributor

Section 140(7) allows Input Service Distributor to distribute credit in respect of input services received before the appointed day, even if invoice relating to such services are received after the appointed date i.e., 01st July'2017. The closing balance of credit with Input Service Distributor on 30th June 2017 can be distributed as CGST Credit.

Section 140(8) – Transitional Credit for Input Service Distributor

Section 140(8) provides that, a person having centralised registration under erstwhile regime, shall be eligible to carry forward to his electronic credit ledger the balance amount of Cenvat credit.

A condition for claiming the credit is that the person needs to file his return for the period ending 30-6-2017, within a period of 3 months from the appointed date i.e., 01st July'2017.

Section 140(9) – Recredit of Credit reversed in the Erstwhile Regime for non-payment

In cases where CENVAT credit availed in the erstwhile regime was reversed for non-payment of consideration within 3 months can now be claimed in the GST regime if the registered person makes the payment of the consideration within 3 months from the appointed date i.e., 01st July'2017.

Section 141: Deals with transitional provisions relating to job work including:

a) Inputs removed to job worker but returned to principal manufacturer after 1st July 2017, no tax payable if returned within 6 months from 1st July 2017.
b) Semi-finished goods removed from premises for carrying out any manufacturing activity and returned after 1st July 2017, no tax payable if returned within 6 months from 1st July 2017
c) If manufactured Excisable goods removed for the purpose of testing or any other process not amounting to manufacture, no tax payable if returned within 6 months from 1st July 2017
d) The above details to be disclosed in table 9 of TRAN-1.

e) In case such goods are returned after expiry of 6 months from 1st July 2017, input tax credit shall be liable to be recovered as per Section 142(8)(a).

Section 142: Provides for miscellaneous transitional provisions

142(1): Returning of goods on which duty is paid:

- Where any goods on which duty had been paid under existing law at the time of removal not being earlier than six months prior to 1st July 2017,
- are returned to any place of business on or after 1st July 2017, the registered person shall be eligible for refund of the duty paid under the existing law
- where such goods are returned by a person, other than a registered person, to the said place of business within a period of six months from 1st July 2017, and
- if the said goods are returned by a registered person, the return of such goods shall be deemed to be a supply.

142(2): Revision of prices

In case of price revision, upwards/downwards after 1st July 2017, debit note/credit note respectively, shall be issued within 30 days of such price revision. Such debit/credit note shall be deemed to have been issued under GST law. Further, reduction of liability w.r.t credit notes would be applicable only if the recipient has reduced his ITC corresponding to such reduction of tax liability.

142(3): Refund claim under erstwhile law:

- Every claim for refund filed before, on or after 1st July 2017, 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 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 the provisions of Section 11B(2) of the Central Excise Act, 1944.
- Where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse.
- No refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on 1st July 2017 has been carried forward under GST law.

142(4): Refund of tax paid on exports:

- Every claim for refund filed after 1st July 2017 for refund of any duty or tax paid under existing law in respect of the goods or services exported before or after 1st July 2017, shall be disposed of in accordance with the provisions of the existing law
- Where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse.
- No refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on 1st July 2017 has been carried forward under GST law.

142(5): Refund in respect of services not provided:

- Every claim filed by a person after 1st July 2017 for refund of tax paid under the existing law in respect of services not provided shall be disposed of in accordance with the provisions of 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 the provisions of Section 11B(2) of the Central Excise Act, 1944

142(6)(a): CENVAT Credit found to be admissible by appeal:

- Every proceeding of appeal, review or reference relating to a claim for CENVAT credit initiated whether before, on or after 1st July 2017 under the existing law
- shall be disposed of in accordance with the provisions of existing law, and
- any amount of credit found to be admissible to the claimant shall be refunded to him in cash,
- notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of Section 11B(2) of Central Excise Act, 1944
- and the amount rejected, if any, shall not be admissible as input tax credit under GST law
- 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 GST law

142(6)(b): CENVAT Credit found to be recoverable by appeal:

- Every proceeding of appeal, review or reference relating to recovery of CENVAT credit initiated whether before, on or after 1st July 2017
- under the existing law shall be disposed of in accordance with the provisions of existing law and
- if any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law,
- be recovered as an arrear of tax under this Act and
- the amount so recovered shall not be admissible as input tax credit under GST law.

142(7)(a): Duty/tax found to be recoverable by appeal:

- Every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after 1st July 2017 under the existing law,
- shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law,
- be recovered as an arrear of duty or tax under this Act and
- the amount so recovered shall not be admissible as input tax credit under GST law.

142(7)(b): Duty/tax found to be refundable by appeal:

- Every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after 1st July 2017 under the existing law,
- shall be disposed of in accordance with the provisions of the existing law, and any amount found to be admissible to the claimant shall be refunded to him in cash,
- notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of Section 11B(2) the Central Excise Act, 1944
- and the amount rejected, if any, shall not be admissible as input tax credit under GST law.

142(8)(a): Tax found to be recoverable in adjudication:

- Where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after 1st July 2017, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person,
- the same shall, unless recovered under the existing law, be recovered as an arrear of tax under GST law and the amount so recovered shall not be admissible as ITC under GST law.

142(8)(b): Tax found to be refundable in adjudication:

- Where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after 1st July 2017, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person,
- the same shall be refunded to him in cash under the said law, notwithstanding anything to the contrary contained in the said law other than the provisions of Section 11B(2) of Central Excise Act, 1944
- and the amount rejected, if any, shall not be admissible as input tax credit under GST law.

142(9)(a): Amount recoverable after revision of returns:

- where any return, furnished under the existing law, is revised after 1st July 2017 and if, pursuant to such revision, any amount is found to be recoverable or any amount of CENVAT credit is found to be inadmissible,
- the same shall, unless recovered under the existing law, be recovered as an arrear of tax under GST law and
- the amount so recovered shall not be admissible as input tax credit under GST

142(9)(b): Amount refundable after revision of returns:

- Where any return, furnished under the existing law, is revised after the 1st July 2017 **but within the time limit specified** for such revision under the existing law and
- if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person,
- the same shall be refunded to him in cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of Section 11B(2) of the Central Excise Act, 1944 and
- the amount rejected, if any, shall not be admissible as input tax credit under GST

142(10): Save as otherwise provided in this Chapter, the goods or services or both supplied on or after the appointed day in pursuance of a contract entered into prior to the appointed day shall be liable to tax under the provisions of GST law.

142(11): Tax payable under VAT/Service tax

- Notwithstanding anything contained in section 12 of CGST Act, no tax shall be payable on goods under this Act to the extent the tax was leviable on the said goods under the VAT Acts of the States
- Notwithstanding anything contained in section 13 of CGST Act, no tax shall be payable on services under the Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994
- Where tax was paid on any supply both under the VAT Act and under Chapter V of the Finance Act, 1994, tax shall be leviable under CGST Act and the taxable person shall be entitled to take credit of VAT or service tax paid under the existing law to the extent of supplies made after the 1st July and such credit shall be calculated in such manner as may be prescribed.

142(12): Goods sent on approval basis:

- Where any goods sent on approval basis, not earlier than 6 months before 1st July 2017, are rejected or not approved by the buyer and returned to the seller on or after 1st July 2017,
- no tax shall be payable thereon if such goods are returned within six months from 1st July 2017
- However, tax shall be payable by the person returning the goods if such goods are liable to tax under GST law and are returned after 6 months

142(13): Sale of goods applicable to TDS:

- Where a supplier has made any sale of goods in respect of which tax was required to be deducted at source under any law of a State or Union territory relating to Value Added Tax and
- has also issued an invoice for the same before 1st July 2017, no deduction of tax at source under section 51 shall be made by the deductor under the said section where payment to the said supplier is made on or after 1st July 2017.

Time limit and procedures for filing of TRAN forms:

GST brought with it the mechanism to carry forward the credit available to the taxpayers in the erstwhile regime by way of filing Form TRAN-1 mentioned under sub-section (1) of section 140. However, the manner and procedure to carry forward the said CENVAT credit is provided under the CGST Rules.

As per Rule 117, Every registered person entitled to take credit of input tax under section 140 shall, within ninety days of the Appointed Day. However, the Government had extended the time limit multiple times due to technical issues. Following was the chronology of extensions given:

Sl. No	Due Date Extended to	Source
1	31st October' 2017	Order No. 03/2017 - GST dated 21st September, 2017
2	30th November' 2017	Order No. 07/2017 - GST dated 28th October, 2017
3	27th December'2017	Order No. 09/2017 - GST dated 15th November, 2017
4	31st March '2019	Notification No. 48 /2018 – Central Tax
5	31st December '2019	Notification No. 49 /2018 – Central Tax
6	31st March '2020	Notification No. 02 /2020 – Central Tax

Further, attention is brought to the Delhi High Court judgement in Brand Equity Treaties Ltd Vs UOI [2020 (38) G.S.T.L. 10 (Del.)], wherein it was held that the time limit in Rule 117, is directory in nature period of limitation of 3 years under the Limitation Act would apply, and directed the Department to allow all assessees to claim input tax credit in TRAN-1 by 30th June 2020.

This had temporarily brought relief to various taxpayers who could not file TRAN-1 (due to technical issues or otherwise) and those wishing to amend the form already filed. However, this did not reduce the amount of writ petitions filed by the taxpayers in various High Courts pleading for allowance to file of TRAN forms which couldn't be filed due to technical glitches in the GST common portal.

Supreme Court Judgement in Filco Trade Centre:

Various High Courts had held that transitional ITC should be allowed, as disallowing ITC would lead to violation of Article 300A of the Constitution of India and that a legitimate claim of CENVAT credit/ITC on the ground of non-filling of TRAN-1 by 27th December 2017, cannot be denied.

The issue was put to rest by the Hon'ble Supreme Court in the case of UOI Vs Filco Trade Centre Pvt. Ltd. & Anr [2022-TIOL-57-SC-GST] wherein numerous petitions filed by the Government had been disposed off, adjudging as follows:

1) GSTN is directed to open common portal for filing concerned forms for availing Transitional Credit through TRAN-1 and TRAN-2 for two months i.e. w.e.f. 1st September 2022 to 31st October 2022. (the window shall now be open from 1st October to 31st December 2022, based on request by the Government to the Supreme Court)
2) Considering the judgments of the High Courts on the then prevailing peculiar circumstances, any aggrieved registered assessee is directed to file the relevant form or revise the already filed form irrespective of whether the taxpayer has filed writ petition before the High Court or whether the case of the taxpayer has been decided by Information Technology Grievance Redressal Committee (ITGRC).
3) GSTN has to ensure that there are no technical glitch during the said time.
4) The concerned officers are given 90 days thereafter to verify the veracity of the claim/transitional credit and pass appropriate orders thereon on merits after granting appropriate reasonable opportunity to the parties concerned.
5) Thereafter, the allowed Transitional credit is to be reflected in the Electronic Credit Ledger.
6) If required GST Council may also issue appropriate guidelines to the field formations in scrutinizing the claims.

Further to this judgement, the Government had requested the Supreme Court for an extension of 1 month for opening of the window on the GST portal which was granted by the Court on 2nd September 2022 (Miscellaneous Application No.1545-1546/2022 in SLP(C) No. 32709-32710/2018). Thus, the common portal shall open the window for filing/revising of TRAN forms from 1st October 2022 to 30th November 2022.

Pursuant to this, the CBIC had issued Circular No. 180/12/2022-GST dated 9th September 2022, wherein guidelines for filing TRAN forms during the 2 months is specified.

Summary of Circular No. 180 dated 9th September 2022

1. **Time period:** Facility is provided for fresh filing/revising of TRAN Forms during 1st October to 30th November 2022.
2. **One-time opportunity:** The option of filing or revising TRAN-1/TRAN-2 on the common portal during the period from 01.10.2022 to 30.11.2022 is a one-time opportunity for the applicant to either file the said forms, if not filed earlier, or to revise the forms earlier filed. The applicant is required to take utmost care and precaution while filing or revising TRAN-1/TRAN-2 and thoroughly check the details before filing his claim on the common portal.
3. **Revision of TRAN:** In case of revision of TRAN forms, facility to download earlier filed TRAN-1/2 shall be made available.
4. **Declarations in Annexure A:** At the time of filing or revising the declaration in TRAN-1/TRAN-2, the Applicant is also *required to upload PDF copy of a declaration (as per format in Annexure 'A' of the circular). The declaration requires details such as value of credit claimed in earlier TRAN forms, whether any notice/order issued earlier etc.
5. **TRAN-3:** The applicant claiming credit in table 7A of TRAN-1 on the basis of Credit Transfer Document (CTD) shall also upload on the common portal the pdf copy of TRAN-3, containing the details in terms of the Notification No. 21/2017- CE (NT) dated 30.06.2017.
6. **Restriction in credit w.r.t certain forms:** With respect to table 5(b) & 5(c) of TRAN-1, no claim for shall be filed in respect of C-Forms, F-Forms and H/I-Forms which have been issued after 27th December 2017.
7. **Manner of filling TRAN-2:** Entire claim in TRAN-2 to be filed in a consolidated manner (i.e., instead of filing the claim tax period-wise as referred to in Rule 117(4)(b)(iii) of CGST Rules). In such cases, in the column 'Tax Period' in TRAN-2, the last month of the consolidated period for which the claim is being made shall be mentioned.

8. **Editing/Modification of TRAN forms:** The applicant can edit the details in TRAN-1/ TRAN-2 on the common portal only before clicking the 'Submit' button on the portal. The applicant is allowed to modify/edit, add or delete any record in any of the table of the said forms before clicking the 'Submit' button. Once 'Submit' button is clicked, the form gets frozen, and no further editing of details is allowed.
9. **Filing of TRAN forms:** This frozen form would then be required to be filed on the portal using 'File' button, with Digital signature certificate (DSC) or an EVC. The applicant shall, therefore, ensure the correctness of all the details in TRAN-1/ TRAN-2 before clicking the 'Submit' button.
10. **Submission to Jurisdictional Officer:** Post filing of TRAN form, the applicant shall download a copy of the TRAN-1/TRAN-2 filed on the common portal and submit a self-certified copy of the same, along with declaration in Annexure 'A' and copy of TRAN-3, where ever applicable, to the jurisdictional tax officer within 7 days of filing of declaration in TRAN-1/TRAN-2 on the common portal.
11. **Documents to be kept ready:** The applicant shall keep all the requisite documents/records/returns/invoices, in support of his claim of transitional credit, ready for making the same available to the concerned tax officers for verification.
12. **Subsequent revision not allowed:** Pursuant to the order of the Hon'ble Apex Court, once the applicant files TRAN-1/TRAN-2 or revises the said forms filed earlier on the common portal, no further opportunity to again file or revise TRAN-1/TRAN-2, either during this period or subsequently, will be available to him.
13. **Advisory to be issued:** GSTN will issue a detailed advisory in this regard and the applicant may keep the same in consideration while filing the said forms on the portal.
14. **Cases where TRAN credit was rejected:** In cases where the credit availed by the registered person on the basis of GST TRAN-1/TRAN-2 filed earlier, has been either wholly or partly rejected by the proper officer, the appropriate remedy in such cases is to prefer an appeal against the said order or to pursue alternative remedies available as per law.
15. **Adjudication cases:** Where the adjudication/ appeal proceeding in such cases is pending, the appropriate course would be to pursue the said adjudication/ appeal. In such cases, filing a fresh declaration in TRAN-1/TRAN-2, pursuant to the special dispensation being provided vide this circular, is not the appropriate course of action.
16. **Verification by department:** The declaration in TRAN-1/TRAN-2 filed/revised by the applicant will be subjected to necessary verification by the concerned tax officers. The applicant may be required to produce the requisite documents/ records/ returns/ invoices in support of their claim of transitional credit before the concerned tax officers for verification of their claim.

17. **TRAN credit allowed after verification only:** After the verification of the claim, the jurisdictional tax officer will pass an appropriate order thereon on merits after granting appropriate reasonable opportunity of being heard to the applicant. The transitional credit allowed as per the order passed by the jurisdictional tax officer will be reflected in the Electronic Credit Ledger of the applicant on the common portal.

In light of the provisions, Supreme Court order and the CBIC circular issued, various issues and solutions/suggestions are discussed hereunder.

Issues and Analyses:

Eligibility for filing TRAN forms:

1. **For what period is the window being opened for filing of TRAN forms?**

   The GST common portal is being opened from 1st October 2022 to 30th November 2022 for filing of TRAN forms.

2. **Who are eligible to take benefit of TRAN forms window opening?**

   The following persons are eligible to take benefit:

   a) Those who did not file TRAN-1/2
   b) Those who could not file TRAN-1/2 due to technical issues
   c) Those who could not file TRAN-1/2 due to non-technical issues
   d) Those who filed TRAN forms but wishes to revise the same

3. **What are the instances in which TRAN forms can be revised?**

   Following are some instances in which TRAN forms can be revised now:

   a) Incorrect values entered due to clerical errors
   b) Inadvertent omission in disclosure amounts in fields due to any other reasons
   c) Remaining 50% of CENVAT credit w.r.t. capital goods (if not carried forward yet)
   d) Could not file TRAN forms due to technical glitches
   e) Revision of TRAN forms in case incorrect values shown due to technical glitches

4. **Whether form TRAN-3 can be filed during these 2 months?**

   Circular No. 180 provides that a PDF copy of TRAN-3 shall be submitted along with TRAN-1 application and there has been no further clarification in this respect. Thus, online filing of TRAN-3 may not be available during the 2 months.

5. **Whether this benefit is available for those who have not filed any writ petition before any High Courts?**

   Yes. The Hon'ble Supreme Court has specifically provided that any "aggrieved person" can take the benefit of the opening window *"irrespective of whether the taxpayer has filed writ petition before the High Court"*.

   A declaration in Annexure A, which has been specified in the Circular to be uploaded along with TRAN-1/2, the applicant is required to provide details of the petition filed before any High Court against any order by the Department w.r.t TRAN filings. Further, the status of the petition (i.e., whether it has been disposed off or not) is also required to be mentioned in the declaration.

6. **Whether TRAN forms can be filed by those persons who have not filed any grievance with the IT grievance cell?**

   Yes. The Hon'ble Supreme Court has specifically provided that any **"aggrieved person"** can take the benefit of the opening of window *"irrespective of whether the case of the taxpayer has been decided by Information Technology Grievance Redressal Committee (ITGRC)."*

   The Circular does not provide any guidance with respect to such cases. Thus, going by the Hon'ble Supreme Court order, persons are eligible to avail of the benefit of filing TRAN-1/2 during these 2 months, whether or not they have filed grievance with the IT grievance cell.

Verification by Department:

7. **Whether transitional credit filed through TRAN forms will automatically get credited to the taxpayers' electronic credit ledger?**

   The Circular specifies that the credit claimed through TRAN forms filed during the 2-month period would first be verified by the proper officer based on which an order will be passed. The transitional credit allowed as per the order passed by the jurisdictional tax officer will be reflected in the Electronic Credit Ledger of the applicant on the common portal.

This is also pursuant to the decision by the Supreme Court wherein it was held that:

"4. The concerned officers are given 90 days thereafter to verify the veracity of the claim/transitional credit and pass appropriate orders thereon on merits after granting appropriate reasonable opportunity to the parties concerned.

5. Thereafter, the allowed Transitional credit is to be reflected in the Electronic Credit Ledger."

Verification of TRAN claims may be prone to create a lot of back-and-forth between the Department and the assessees. This may delay credit of TRAN claims in the electronic credit ledger. Further, the Circular does not specify anything regarding a process for crediting of amount from the backend by the Department officials when an order is passed. This procedure may lead to more delays in assessees receiving TRAN credit to their electronic credit ledger.

8. What happens if TRAN application gets rejected after verification by department?

As per the Supreme Court order, the department is given 90 days to verify the claim of credit in TRAN-1/2, within which an order is required to be passed after giving the applicant a reasonable opportunity to be heard. Post this, the transitional credit allowed as per the order passed by the jurisdictional tax officer will be reflected in the Electronic Credit Ledger of the applicant on the common portal.

However, if the department rejects the TRAN application of any assessee, no amount would be credited to the electronic credit ledger. The assessee may be forced to appeal against the order on merits of ground. This may lead to further litigation.

9. What happens when no order is passed by the department within 90 days?

The Supreme Court has specifically held that a period of 90 days is given to the officers for verification of TRAN credit claim AND issue order thereon after giving the assessee a reasonable opportunity to be heard.

However, it is pertinent to note that the Circular No. 180 only mentions that the proper officers shall verify the TRAN claims and issue order post which TRAN claims would be credited to the electronic credit ledger. Time limit of 90 days is nowhere mentioned.

Further, there is no guidance provided in the Circular in case of delays beyond 90 days. Thus, it may be pertinent for taxpayers to continuously follow-up with the officers for issuance of order.

Revision of TRAN forms:

10. Where TRAN forms have been revised during the 2-month period, whether such revised TRAN forms replace the forms filed earlier?

Circular No. 180 provides that for persons who wish to revise their TRAN forms, the old forms would be made available online which may be downloaded. There are no clarifications provided in the Circular as to whether the revised forms replace the old ones. For instance, if TRAN-1 was filed earlier for Rs. 1,000 and now a taxpayer wishes to claim Rs. 500 more, whether the TRAN-1 should be filed now for Rs. 500 or for Rs. 1,500?

Another issue which arises that if, such Rs. 1,000 has already been accepted by department earlier after verification, then filing Rs. 1,500 in TRAN would lead to entire amount entering litigation process again.

Though there is no clarification for the same provided in the Circular, it is now provided in the GSTN guidelines that in case a taxpayer has already filed his original TRAN and wants to revise his/her earlier filed TRAN, the taxpayer is requested to **file the complete form with all the required details and not the differential values** (i.e. the difference between originally claimed credit and credit being claimed now).

Thus, in the above example, the taxpayer would be required to file TRAN-1 for Rs. 1,500.

11. Whether amendments/revision to TRAN forms is permitted when filed during 1st October to 31st December?

The Circular provides specifically that the 2-month period is a one-time opportunity provided to assessees for filing TRAN-1/2 and the assessees are required to take utmost care and precaution while filing or revising TRAN1/TRAN-2 and thoroughly check the details before filing their claim on the common portal.

Further, it is important to note that while filing TRAN-1/2, if there is requirement for any modification/edit/addition/deletion, the same shall be made before clicking on the "Submit" button. Once "submit" button is clicked, the TRAN form shall be frozen and no modifications will be allowed. The Form can only be filed post submission.

Thus, assessees are required to be very careful to avoid any mistakes/clerical errors and re-check the forms thoroughly before clicking on the "Submit" button.

Issuance of Notice relating to TRAN forms:

12. Whether notice u/s 73 and 74 can be issued for TRAN credit?

Rule 121 of CGST Rules provide that the amount credited in the electronic credit ledger of the assessee, post filing of TRAN forms may be verified and proceedings under section 73 or section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly.

Section 73 provides for issuance of notice for any tax not paid, short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised for reasons other than fraud, wilful-misstatement or suppression of facts to evade tax. Section 74 provides for issuance of notice for any tax not paid, short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised for reasons of fraud, wilful-misstatement or suppression of facts to evade tax.

Now question arises, if the transitional credit can be considered as "input tax credit" for the purpose of issuance of notice under sections 73/74. It is pertinent to understand the definition of "input tax credit" in this regard. Section 2(62) and 2(63) may be referred to in this regard.

"(63) "input tax credit" means the credit of input tax;"

"(62) "input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax ***charged on any supply of goods or services or both made to him and includes—***

(a) the integrated goods and services tax charged on import of goods;

(b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;

(c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;

(d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or

(e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy;

From the above definitions, it is clear that input tax is the CGST, SGST/UTGST, IGST charged for supply of goods/services to a person. A view is possible that transitional credit, which as per Section 140, is the amount of "CENVAT credit" carried forward/on inputs in stock, and does not fall under the definition of "input tax" and thus would not be considered as "input tax credit".

If transitional credit does not amount to "input tax credit", then the power of proper officer to issue notice for "input tax credit" wrongly availed or utilised u/s 73/74 for credit claimed through TRAN-1/2 can be challenged.

Further, it is a well-settled law that Rules cannot override the provisions of the Act. Section 140-143 does not anywhere provide for demand proceedings with respect to transitional credits. Thus, Rule 121 does not have any backing provision in the Act for empowering department to issue notice for transitional credits. This could be another argument against issuance of notice.

However, it is seen that department issues notices u/s 73/74 for wrongful availment of TRAN credit citing powers from Rule 121. The above contention may be adopted for challenging the powers of department to issue notice against TRAN credit claims.

13. Whether notice can be issued against TRAN-1/2 filed during the two months (i.e., from 1st October to 30th November 2022)?

The contention provided in the answer to the previous question may be adopted for challenging the power of the department to issue notice for TRAN credit claims.

However, without regard to the above contention that transitional credit is not input tax credit, the following view is possible.

Section 73/74 empowers proper officer to issue notice for input tax credit wrongly **"availed"** or "utilised". Here, is it important to understand the scope of the term "availed". The term "avail" is defined in Black's law Dictionary to mean *"use or advantage"* and the term "availment" is defined as *"The act of making use or taking advantage of something for oneself"*

The term "availed" also differs from the word "taken" which only denotes eligibility and not actual availment/availability of credit in electronic credit ledger. It is also pertinent to the note the decision of Patna High Court in the case of Commercial Steel Engineering Corporation Vs State of Bihar [2019 (28) G.S.T.L. 579 (Pat.)] wherein it was held as follows:

"In my opinion, the Assistant Commissioner of State Taxes has somewhere got confused to treat the transitional credit claimed by the dealer as an availment of the said credit when in fact an ***availment of a credit is a positive act and unless carried out for reducing any tax liability by its reflection in the return filed for any financial year, it cannot be a case of either availment or utilization****…*

…Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under Section 73(1) of 'the BGST Act'. ***The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax*** *together with levy of interest and penalty under Section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'."*

In case of TRAN-1/2 filing in the two months from 1st October to 30th November, it is clear from the Circular guidelines that TRAN claims will be credited to the electronic credit ledger only after verification of the department and order issued in that regard. Thus, such transitional credit may not be said to be "availed" until it is verified and sanctioned by department. Therefore, a view is possible that the department is not empowered to issue notice for TRAN-1/2 forms filed now before issuance of order.

Further, it may also be noted that currently, there are no guidelines issued by CBIC w.r.t the procedure for requesting documents from taxpayers or how the opportunity of being heard would be executed. The department may issue notice against TRAN-1/2 filed now for rejection of application. The taxpayers could contend based on the above arguments.

Cases where transitional credit was claimed through GSTR-3B:

14. Where a taxpayer who has availed transitional credit through GSTR-3B and was rejected, whether TRAN forms can be filed now?

Circular No. 180 requires taxpayers to upload a declaration along with TRAN-1/2 wherein the taxpayer is required to provide undertaking as follows:

*3) (a) *I/We **have not claimed any credit,** within the meaning of sections 140, 141 and 142 of the Central/ State/ UT Goods and Services Tax Act, 2017, **in any return in FORM GSTR-3B** filed by me/us; OR*

*4) (b) *I/We **have claimed credit,** within the meaning of sections 140, 141 and 142 of the Central/ State/ UT Goods and Services Tax Act, 2017, amounting to Rs.------- on account of central tax and Rs.------ on account of State/ union territory tax **in my/ our return in FORM GSTR-3B** filed by me/ us for the period --------and I/ **we have reversed an amount** of Rs.------- on account of central tax and Rs.------- on account of State/ union territory tax, **along with an interest** of Rs…….. vide <<details of such debit/ payment to be provided>>**/ **have not** reversed the said amount, along with applicable interest.***

Thus, the following declaration is required that:

1. No transitional credit claimed through GSTR-3B, or
2. Transitional credit has been claimed through GSTR-3B but has been reversed along with interest, or
3. Transitional credit has been claimed through GSTR-3B but has NOT been reversed along with interest.

It is seen that neither the Supreme Court order nor the Circular restricts any person to file fresh TRAN-1/2 during the 2 months in case TRAN credits were availed through GSTR-3B. However, appropriate declaration as mentioned above is required to be submitted. Although the credit was rejected by the department, whether or not the credit was reversed by the taxpayer, TRAN-1/2 may be filed now to claim such credit.

However, in case a taxpayer opts NOT to reverse the TRAN credit claimed through GSTR-3B and files TRAN-1 now, giving appropriate disclosures, the department may demand the assessee to reverse the credit along with interest. This may lead to drawn-out litigations.

15. What are the implications in case of assessees who have claimed Transitional credit through GSTR-3B pursuant to High Court orders?

Various High Courts decisions such as Nodal Officer, Jt. Commissioner, It Grievance Vs Das Auto Centre [2022 (56) G.S.T.L. 257 (Cal.)] and Hans Raj Sons Vs UOI [2020 (34) G.S.T.L. 58 (P & H)] allowed assessee to claim transitional credit through form GSTR-3B as filing of TRAN-1 was not feasible due to non-availability in the portal.

In such cases where the assessees have claimed transitional credit in GSTR-3B may be required to file TRAN-1/2 now giving appropriate undertaking as discussed in the answer to the previous question.

From the wordings of the circular and annexure thereof, it could be said that the intention of the Government is to streamline claim of transitional credit through TRAN-1/2 which accordingly provides such declaration.

16. If transitional credit is availed through GSTR-3B and an assessee opts to reverse the same, whether such reversal is to be made with interest?

Para 4(b) to the declaration in Annexure A specified in Circular No. 180 provides an undertaking to be provided by the taxpayer that when any transitional credit is claimed through GSTR-3B, the same is either reversed with interest or not reversed along with interest. Accordingly, the department requires the taxpayers to reverse the credit with interest. But question arises, whether interest for such reversal is applicable or not?

Section 50(3) of CGST Act as retrospectively substituted vide Finance Act 2022 provides as follows:
*"(3) Where the **input tax credit has been wrongly availed and utilised**, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed."*

Based on the above, interest of 18% is applicable only when "input tax credit" has been **wrongly** "availed and utilised". Here, the following arguments arise:

a) Whether transitional credit can be considered as input tax credit?
b) Even if TRAN credit is considered as ITC, whether it is "wrongly" availed and utilised?
c) What will happen when the transitional credit is only availed and not utilised?

Let us analyse the above arguments.

a) Whether transitional credit can be considered as input tax credit?

   Based on discussion in answer to query 12, an argument is possible that transitional credit does not fall within the definition of "input tax credit" and thus, section 50(3), levying interest on "Input Tax Credit" wrongly availed and utilised would not apply. Therefore, taxpayers could take a view to reverse TRAN credit availed through GSTR-3B without interest. However, this would lead to litigation.

b) Even if considered as ITC, whether it is "wrongly" availed and utilised?

A view is possible that TRAN credit availed through GSTR-3B pursuant to High Court decisions may not be considered as "wrongly" availed because the TRAN credit was always available to the taxpayer and the mode of availment does not affect the vested right of credit. Thus, an assessee may opt to reverse the TRAN credit without interest based on this contention.

c) What will happen when the transitional credit is only availed and not utilised?

It is clear from the amended Section 50(3) that interest on input tax credit is levied only when wrongly "availed **and** utilised". Following the above discussion, even if a stance is taken that TRAN credit is "wrongly" availed, interest will be payable only if such credit is utilised.

The circular providing for reversal of TRAN credit availed through GSTR-3B along with interest may be challenged by the taxpayers in case the monetary value is high. This aspect included in the Circular may tend to bring out more litigation in future.

However, on a practical note, it may be suggested for taxpayers to not reverse TRAN credit availed through GSTR-3B and give appropriate declaration in Annexure A and file TRAN-1/2 now.

Cases where proceedings are pending:

17. Where the department has already completed TRAN verification and/or Audit proceedings for the FY in which such TRAN credit was claimed and no issues were raised, whether TRAN forms can be revised now?

Circular No. 180 clarifies that those registered persons, who had successfully filed TRAN-1/TRAN-2 earlier, and who do not require to make any revision of the same, are not required to file/ revise TRAN-1/TRAN-2 during this period from 01.10.2022 to 30.11.2022.

Thus, in case TRAN verification/audit was already conducted and concluded and no issues were raised by department, TRAN-1/2 need not be filed. However, if the taxpayer intends to revise the earlier filed TRAN forms due to reasons such as clerical errors, omissions etc., they can do the same during these 2 months. However, the new TRAN-1/2 may be considered as fresh applications and fresh verification and proceedings may begin (although there is no clarifications provided in this

regard from CBIC). Thus, unless the monetary value is significant, it is suggested that such taxpayers need not file TRAN forms again now.

18. Whether TRAN-1/2 can be filed now in case of on-going proceedings for TRAN forms already filed earlier?

Para 4.7 of Circular No. 180 specifies the following:

"In this context, it may further be noted that in such cases where the credit availed by the registered person on the basis of FORM GST TRAN-1/TRAN-2 filed earlier, has either wholly or partly been rejected by the proper officer, the ***appropriate remedy in such cases is to prefer an appeal against the said order*** *or to pursue alternative remedies available as per law. Where the* ***adjudication/ appeal proceeding in such cases is pending, the appropriate course would be to pursue the said adjudication/ appeal.*** *In such cases, filing a fresh declaration in FORM GST TRAN-1/TRAN-2, pursuant to the special dispensation being provided vide this circular, is not the appropriate course of action."*

Thus, the Circular specifies that in case of pending proceedings w.r.t TRAN claims, the appropriate course is to pursue the adjudication/appeal and not file fresh TRAN-1/2. Further, declaration in Annexure A also requires the taxpayer to declare the details of any notice/order issued and appeal/petition filed.

Given that filing of fresh TRAN-1/2 would take the application into departmental verification again, it is recommendatory that such taxpayers pursue the already on-going adjudication proceedings and not duplicate litigation.

19. Whether TRAN-1/2 can be filed now for CENVAT Credit which has been utilised for payment of central excise/service tax pursuant to any notice issued under erstwhile law?

Declaration in Annexure A to Circular No. 180 requires the applicant to declare the following:

"5) I/We have ***not utilized or adjusted any amount of credit under the existing law,*** *in response to any demand/ liability arising out of self-determination or assessment or audit or investigation, out of the amount being claimed as transitional credit in FORM GST TRAN-1/ TRAN-2;"*

Therefore, if any person has adjusted any amount of transitional credit for self-assessment/demand under erstwhile law, the department could reject the same if such amount is claimed through TRAN-1/2 filed now.

Cases of refund rejection in erstwhile law:

20. Refund was applied for the accumulated CENVAT under Rule 5 of CENVAT Credit Rules and thus, no balance was carried forwarded in the return file before the appointed date. However, part refund was rejected. Whether TRAN-1 can be filed now for such rejected amount?

Section 140(1) provides for transition of CENVAT credit "carried forward in the return" relating to the period ending with the day immediately preceding the appointed day. This raises the said question of whether the rejected portion of CENVAT credit refund can be transitioned into GST.

This takes us to Section 142 which specifies miscellaneous transitional provisions. Sub-sections (3), (4) & (5) relating to refund is extracted hereunder:

(3) ***Every claim for refund filed by any person*** *before , 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 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 the provisions of sub-section (2) of section 11B*** *of the Central Excise Act, 1944 (1 of 1944):*

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."

"(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:*

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."

"(5) Every claim filed by a person after the appointed day for ***refund of tax paid under the existing law in respect of services not provided*** *shall be disposed of in accordance with the provisions of 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 the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 (1 of 1944)."

In the current scenario, sub-section (4) and (5) are not applicable since refund of CENVAT credit is claimed for exports. Sub-section (3) specifies that the refund claim of CENVAT credit **"under the existing law"** shall be disposed off as per provisions of existing law and to be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than Section 11B(2) of Central Excise Act, 1944 (i.e., proving that unjust enrichment did not occur).

From a plain reading of sub-section (3), it could be said that the refund claim should have been filed as per provisions of erstwhile law and the amount of refund allowed shall be paid in cash and the rejected portion shall lapse.

However, in the current case, rejection of refund led to excess debit of CENVAT credit from its ledger which now cannot be re-credited due to non-operation of erstwhile returns. This would lead to taxpayers losing the benefit of refund/CENVAT credit. In this regard, it is relevant to analyse Section 174(2)(c) of CGST Act which provides that repeal of the erstwhile laws **shall not affect any right, privilege,** obligation or liability acquired, **accrued or incurred under the amendment Act or repealed Acts** or orders under such repealed or amended Acts.

It is also important to note that Section174(3) specifically provides that sub-sections (1) and (2) of section 174 shall not be held to prejudice or affect the general application of Section 6 of General Clauses Act 1897 with regard to effect of appeal. Section 6 of General clauses Act similarly provides as follows:

"6. Effect of repeal. *Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears,* ***the repeal shall not:***

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

In this regard, it is pertinent to note the following Supreme Court judgements:

a) **Commissioner of Income Tax, U.P vs Shah Sadiq And Sons (1987 SCR (2) 942):** Ruled that: *"a right which had accrued and had become vested, continued to be capable of being enforced notwithstanding the repeal of the statute under which that right accrued unless the repealing statute took away such right expressly or by necessary implication. This is the effect of Section 6 of the General Clauses Act, 1897.*

b) **M/s Gurcharan Singh Baldev Singh v. Yashwant Singh and Ors. (1992) 1 SCC 428:** The Court observed that:
"The objective of Section 6(c) of the General Clauses Act, 1897 is to ensure protection of any right or privilege acquired under the repealed Act. The only exception to it is legislative intention to the contrary. That is, the repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability."

c) **Hoosein Kasam Dada (India) Ltd vs The State Of Madhya Pradesh (1953 SCR 987):** Held as follows:
"The true implication of the above observation as of the decisions in the other cases referred to above is that the pre-existing right of appeal is not destroyed by the amendment if the amendment is not made retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right."

Thus, it is clear from the above that rights and privileges earned under earlier law cannot be destroyed or taken away by repeal of the said law unless expressly provided in the repealed law.

In the current scenario, the erstwhile Central Excise Law or CENVAT Credit Rules do not provide for any express provision denying the benefit of CENVAT Credit/refund available on repeal of the Acts. Thus, a view is possible that such CENVAT credit/refund is still eligible to be claimed by taxpayers.

However, in case refund of CENVAT credit is rejected, wherein the proviso of Section 142(3) provides that the same shall lapse, it could be argued to be contrary to Section 174(2) and Section

6 of General Clauses Act. Further, even in such scenarios, the taxpayers would find themselves unable to avail the credit back since the returns under erstwhile laws are non-operational. Here, a view could be taken that such rejected refund be availed through TRAN-1, being the only option provided to taxpayers for transitioning CENVAT credit to ITC under GST.

In this regard, it is pertinent to refer to the following judgements:

a) <u>State Of Mysore And Ors. vs Mallick Hashim & Co (1973 31 STC 358 SC):</u>

"The manner in which that refund could be made should be prescribed by a rule as the proviso expressly authorises. Similarly, the conditions subject to which that refund shall be made could also be imposed by a rule. But ***no conditions could be imposed which destroy the right to a refund*** *which is otherwise absolute. The conditions authorised are conditions which regulate the refund* ***and not conditions which result in the extinguishment of the right to a refund*** *which the Legislature has created under the proviso."*

b) <u>TVL. M.R. Motor Company Vs Assistant Commissioner (CT), (FAC), Salem [2020 (38) G.S.T.L. 174 (Mad.)]:</u>

"20. If the amount lying unutilised after due adjustment were refunded by the respondent then and there as was required under the provisions of the TNVAT Act, 2006, the question of petitioner being forced to transit credit would not have arisen. In this case, the petitioner has merely continued to accumulate the credit and adjust the amount.

<u>21. Merely because the TNVAT Act, 2006 was substituted with Tamil Nadu Goods and Services Tax Act, 2017 with effect from 1-7-2017 by itself did not mean that the petitioner would [not] be entitled to refund merely because the petitioner filed Form Transfer-1.</u>

22. The petitioner cannot be found fault with. It did not mean that the petitioner was not entitled to refund of the accumulated Input Tax Credit which was lying unutilised after due adjustment."

c) **<u>Rakon India Pvt. Ltd.Vs Commr. of Central Tax, Bangalore North [2021 (54) G.S.T.L. 183 (Tri. – Bang)]:</u>**

"Therefore, the impugned order wrongfully invoked the Section 142(3) to reject the refund claim. ***It is a fact that if CGST Law was not introduced, the appellant would have availed credit in ER-1 Returns and as per Section 174(2)(c) of CGST Act, the appellant cannot be affected of its right, privilege, in availing credit merely in respect of refund rejected*** *on account of limitation being passed after 27-12-2017. Further, I am of the opinion that*

change in taxation regime should not affect the credit availment right of assessee. Hence the appellant is ***rightly entitled for the credit and also refund."***

Given the above discussions, although it could be argued that the taxpayer is eligible for CENVAT credit of rejected refund, availing such credit through TRAN-1 could lead to more litigation. In this case, it would be suggested to go for refund under Section 142(5), specifically since Section 142(5) overrides all provisions of erstwhile law except Section 11B(2).

In addition to the above, it is also relevant to analyse the implications of the "Doctrine of Legitimate Expectation" on tax laws in India.

Doctrine of Legitimate Expectation:

Legitimate expectation is where a person has a reasonable expectation of being treated in a particular way owing the general practices / promises made. The doctrine of Legitimate Expectation mainly pertains to the relationship between an individual and a public authority. The doctrine has been developed in the context of principle of natural justice whereby the citizens may legitimately expect to be treated fairly [Ashoka Smokeless Coal India (P) Ltd Vs UOI (2007) 2 SCC 640]. The logical extension of the said doctrine is that it is implicit in Article 14 that a change in policy by the Government must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. [Bannari Amman Sugars Ltd vs Commercial Tax Officer (2005) 1 SCC 625].

Taking into consideration the Doctrine of Legitimate Expectation in the given case of rejected CENVAT credit refund, it could be said that a taxpayer conducts his business in the expectation of being allowed to carry forward credit or receive refund, and denial of the same goes against Article 14 of the Constitution. It was similarly held in the case of Siddharth Enterprises Vs Nodal Officer [2019 (29) G.S.T.L. 664 (Guj.)] as follows:

"It Is legitimate for a going concern to expect that it will be allowed to carry forward and utilise the Cenvat credit after satisfying all the conditions as mentioned in the Central Excise Law and, therefore, disallowing such vested right is offensive against Article 14 of the Constitution as it goes against the essence of doctrine of legitimate expectation…

…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. Such action violates the mandate of Article 19(1)(g) of the Constitution of India."

Based on the above interpretations and relying on the judgements of TVL M.R. Motor Company & Rakon India Pvt Ltd, taxpayers could take a stance to transition the rejected refund of CENVAT credit in the TRAN-1/2 during the two months from 1st October to 30th November 2022. However, the same could be prone to litigation.

Whether details of rejected refund should be disclosed in Annexure A?

With respect to adjudication, Annexure A requires details in the following cases:

1. Notice or order u/s 73/74 of CGST Act,2017 issued in respect of the credit availed through TRAN-1/TRAN-2 filed earlier
2. Appeal preferred u/s 107 of CGST Act/ petition before Hon'ble High Court against order referred to above
3. Whether any notice issued or order passed under existing law with regard to admissibility of the credit claimed as transitional credit

The above declarations do not include proceedings related to refund of CENVAT credit. Further, para 4.7 of the Circular provides that where any adjudication/appeal proceeding is pending in case of credit availed through TRAN-1/2, the appropriate remedy would be to pursue such adjudication/appeal. Para 4.7 also specifies only cases related to credit transitioned through TRAN-1 and does not clarify refund cases under earlier laws. Thus, taxpayers could take a stance to not disclose details of the refund proceedings in Annexure A. However, it is suggested that details of such refund proceedings be voluntarily provided in light of transparency in proceedings.

Cases where credit not availed in erstwhile law:

21. Whether any missed out CENVAT credits in ER-1/ST-3 can be availed through TRAN-1?

Section 140(1) allows for transition of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding 1st July 2017 as furnished by him under the existing law. Thus, through this provision, the Government intends to restrict transition of so much amount of credit as is shown in the last return filed under erstwhile law.

However, question arises as to whether transition of missed out credits under erstwhile law is now eligible? In this regard, the following points may be anlaysed:

a) Article 300A of the Constitution provides that no person shall be deprived of his property save provided by authority of law.
b) It has been observed in various judgements that credit accrued by the taxpayers are "property of the assessees" such as:
    a. Brand Equity Treaties Ltd Vs UOI [2020 (38) G.S.T.L. 10 (Del.)]
    b. A.B. Pal Electricals Pvt. Ltd Vs UOI [2020 (33) G.S.T.L. 8 (Del.)]
    c. SRC Aviation Pvt. Ltd. Vs UOI — MANU/DE/4345/2019
    d. Aadinath Industries Vs UOI [2019 (30) G.S.T.L. 478 (Del.)]
c) It could be contended that the CENVAT credit standing in favour of an assessee is "property" and the assessee could not be deprived of the said property save by authority of law in terms of Article 300A of the Constitution of India. As there being no law which extinguishes the said right to property of the assessee, credit is eligible to be claimed.
d) Further, the Doctrine of Legitimate Expectation (as per answer to query 20) could be relied upon for arguing for the eligibility of credit of such missed out claims.

Taking a view that missed-out credits are still eligible, question arises on the mode and manner of transition into GST, i.e.:

a) Whether it can be claimed through TRAN-1?
b) Whether it can be claimed through refund?

<u>Whether it can be claimed through TRAN-1?</u>

Given the restriction in Section 140(1), wherein it requires that the CENVAT credit be included in the last return filed under old law, whether a view can be taken to revise the ER-1/ST-3 now and claim such missed out credits through TRAN-1?

In this regard, it is pertinent to analyse Section 142(9)(b) which provides as follows:

*"(b) where any return, furnished under the existing law, **is revised after the appointed day but <u>within the time limit specified</u> for such revision under the existing law** and if, pursuant to such revision, any amount is found to be refundable or CENVAT credit is found to be admissible to any taxable person, the same shall be refunded to him in cash under the existing law, notwithstanding anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act."*

With the specific provision above which restricts the time limit for revising returns, if a taxpayer opts for including such missed out credits in TRAN-1, it may be highly prone to litigation.

In this regard, it is important to note the Supreme Court judgement in UOI Vs Bharti Airtel Ltd [2021 (54) G.S.T.L. 257 (S.C.)] wherein it was held as follows:

"The supply of goods and services becomes taxable in respect of which the registered person is obliged to maintain agreement, invoices/challans and books of account, which can be maintained manually/electronically. ***The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment.*** *The primary source is in the form of agreements, invoices/challans, receipts of the goods and services and books of account which are maintained by the assessee manually/electronically. These are not within the control of the tax authorities. This was the arrangement even in the pre-GST regime whilst discharging the obligation under the concerned legislation(s). The position is no different in the post-GST regime, both in the matter of doing self-assessment and regarding dealing with* ***eligibility to ITC*** *and OTL."*

Thus, it could be said that as long as credit is accounted in the books of the taxpayer, they are eligible for availing such credit, irrespective of whether disclosed in returns or not. Thus making the argument possible that it is still being eligible as credit through TRAN-1. However, this would also be prone to litigation.

Whether it can be claimed through refund?

This takes us to Section 142(3) which provides that every refund claim filed for any amount of CENVAT credit under the existing law, shall be disposed off in accordance with the existing law and the amount shall be refunded in cash, notwithstanding anything contained in existing law other than Section 11B(2) of Central Excise Act.

The following case laws would be relevant:

a) Terex India Pvt. Ltd. v. Commissioner — 2021 (10) TMI 531:

"When the department admitted that the credit is eligible, then the same ought to have been refunded to the appellant as the appellant could not carry forward the credit to TRAN-1."

b) Circor Flow Technologies India Pvt Ltd Vs Pr. Commissioner of Gst & C. Ex. [2022 (59) G.S.T.L. 63 (Tri. - Chennai)]:

"In the present case, there is no allegation that the credit is not eligible to the appellant. It is merely stated that tax has been paid voluntarily and therefore credit is not available under the GST regime. Though credit is not available as Input Tax Credit under GST law, the credit under the erstwhile Cenvat Credit Rules is eligible to the appellant. Such credit has to be processed under Section 142(3) of GST Act, 2017 and refunded in cash to the assessee."

c) Indo Tooling Pvt Ltd Vs Commissioner, CGST & C. EX., Indore [2022 (61) G.S.T.L. 595 (Tri. - Del.):

"Thus, from a conjoint reading of sub-sections (3), (5) and (8)(a) of the CGST Act, it is evident that an assessee is entitled to claim refund of service tax under RCM paid after the appointed day under the existing law and such claim has to be disposed of according to the provisions of the existing law. As the appellant was entitled to Cenvat credit of the said amount of Rs. 9,85,827/-, which is now no longer available due to GST regime, they are entitled to refund of the said amount."

d) K.G. Denim Ltd Vs CESTAT, Chennai [2017 (7) G.S.T.L. 422 (Mad.)]:

"Re-credit of amount to Cenvat account would not serve purpose for assessee - There was no impediment to grant of refund in cash to assessee, and their case was aided by Section 11B(2)(c) of Central Excise Act, 1944…

… The learned counsel for the assessee has, correctly, argued that the assessee would fall under clause (c) of Section 11B of the CE Act. The said clause requires the concerned officer to refund credit of duty paid on excisable goods used as inputs in accordance with rules made or any notification issued under the CE Act."

Given the above judgements, taxpayers could opt to go for refund of missed out CENVAT credits under Section 142(3), which also overrides the time limit of 1 year for application of refund u/s 11B of Central Excise Act, instead of transitioning them through TRAN-1. However, this option may also amount to litigation, but given the favourable decisions in Tribunal, the chances for allowing refund at Tribunal stage is not low.

22. Whether an assessee who has not carried transitional credit in his balance sheet, but written off as indirect expenses can now file TRAN-1? Would unjust enrichment and anti-profiteering clause get triggered?

Given the discussion regarding eligibility of credit in answer to query 21, a view is possible that such credit may be availed [(preferably as refund u/s 142(3)]. Further, since the credit was

expensed off in the books, reversal of such expense could be made in the books so as to not attract unjust enrichment.

Further, the anti-profiteering clause may also get triggered since Section 171(1) provides that any reduction in rate of tax on any supply of goods or services **or the benefit of input tax credit** shall be **passed on to the recipient** by way of commensurate reduction in prices. Thus, in case a taxpayer opts to avail credit by reversal in books, it needs to be ensured that the benefit is passed on to the recipient.

23. Whether cess credit can be carried forward through TRAN-1?

Section 140(1), after its amendment vide CGST Amendment Act 2018, provided that CENVAT credit of "eligible duties" is allowed to be carried forward into GST. This amendment was made in response to claiming of cess credit in TRAN forms by taxpayers.

However, the meaning of "eligible duties" as specified in Explanation 1 does not include service tax in its purview since the said explanation was meant for credit of inputs in stock and capital goods in the case of Section 140(3), (4) and (6), creating a gap in bringing out the intention of the Government to deny transition credit of cesses. However, it was clarified by CBIC vide Circular No, 87/06/2019-GST dated 2nd January 2019 that for the purpose of Section 140(1), "eligible duties" would cover within its fold the duties which are listed as "eligible duties" at sl. no. (i) to (vii) of explanation 1, and "eligible duties and taxes" at sl. no. (i) to (viii) of explanation 2 to section 140, since the expression "eligible duties and taxes" has not been used elsewhere in the Act.

Further, amendment to explanation 1, making it applicable to sub-section (1) was never made effective through notification. Thus, the gap in legislation still exists. However, it is clear that the intention of the Government is to disallow transitional credit of cesses (education cess, secondary higher education cess and Krishi Kalyan Cess).

Further, Explanation 3 was added vide Amendment Act 2018 specifying that:
"Explanation 3.- For removal of doubts, it is hereby clarified that the expression ***"eligible duties and taxes" excludes any cess*** *which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975 (51 of 1975)."*

However, this explanation apples to "eligible duties and taxes" (Defined in explanation 2) and not for "eligible duties" (as required under Section 140(1) and defined in explanation 1). There again seems to be a gap in drafting for disallowing transition of cess credit.

It was also clarified in the same Circular No. 89 that NO transition of credit of cesses, including cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs Tariff Act, 1975, would be allowed in terms of Explanation 3 to section 140, inserted vide sub-section (d) of section 28 of CGST Amendment Act, 2018 which shall become effective from the date the same is notified giving it retrospective effect.

Further, it would also be relevant to note the Division Bench of Madras High Court in Commr of GST & C. Ex., Chennai Vs Sutherland Global Services Pvt Ltd [2020-TIOL-1739-HC-MAD-GST] had reversed the Single Bench decision in the same case and held as follows:
"Main pitfalls in the reasoning given by the Single Judge are (a) the character of levy in the form of Cess like Education Cess, Secondary and Higher Education Cess and Krishi Kalyan Cess was distinct and stand alone levies and their input credit even under the Cenvat Rules which were applicable mutatis mutandis did not permit any such cross Input Tax Credit, much less conferred a vested right, especially after the levy of these Cesses itself was dropped; (b) Explanation 3 to Section 140 could not be applied in a restricted manner only to the specified Sub-sections of Section 140 of the Act mentioned in the Explanations 1 and 2 and as a tool of interpretation, ***Explanation 3 would apply to the entire Section 140 of the Act and since it excluded the Cess of any kind for the purpose of Section 140 of the Act, which is not specified therein, the transition, carry forward or adjustment of unutilised Cess of any kind other than specified Cess, viz. National Calamity Contingent Duty (NCCD), against Output GST liability could not arise****"*

It may also be relevant to note then case of Godrej and Boyce Mfg Company Ltd Vs UOI [2021-TIOL-2112-HC-MUM-GST] wherein the court quashed the SCN issued by department on the basis of explanation 1 and 2 as the amendment was not yet notified. Further, it also held that the expression 'eligible duties and taxes' used in Explanation 3 to exclude Cesses, does not apply to Section 140(1), as it does not use any such expression. However, the court had also pointed out that the department may issue SCN if it has reasons to believe that the same is recoverable, for reasons other than retrospective amendment.

Thus, transition of cess credit is a highly litigated issue and taxpayers who opt for transition of cess credits are prone to initiation of proceedings by the department in this regard.

However, another view is possible that the taxpayer could claim refund of such unutilised cess credit under Section 142(3), as discussed in earlier answers. However, this would also be prone to litigation, but given the favourable judgements by certain Tribunals and High Courts, the refund option could be suggested.

24. A Company had purchased capital goods in FY 2017-18 and claimed 50% CENVAT Credit in its last return of June 2017. Whether it can claim balance 50% through TRAN-1 now?

Section 140(2) provides that a registered person shall be entitled to take, in his electronic credit ledger, **credit of the unavailed CENVAT credit** in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day.

Thus, the Company would be eligible to claim such unavailed CENVAT credit on capital goods in TRAN-1 to be filed during the 2-month window.

25. Whether CENVAT credit on capital goods in transit as on 1st July 2017 can be availed through TRAN-1?

Section 140(5) allows credit of duty and taxes paid on "inputs and input services" received on or after 1st July 2017 but where duties/taxes were paid under existing law. However, the sub-section does not mention "capital goods", thus leaving a gap for interpretation.

However, a view is possible that such CENVAT credit unclaimed on capital goods in transit is eligible to be availed as per Section 140(2), since it is an "unavailed" credit and is not appearing in the last returns filed under erstwhile law.

Pointers for Professionals:

As discussed in various scenarios above, a lot of issues may arise during filing of TRAN forms which could be prone to litigation. The same is summarised hereunder (for detailed discussions/suggestions, please refer to the relevant query):

Litigation Perspective:

a) Consistent follow-up with the department to ensure order is passed within 90 days.
b) Ensuring that adequate documents/records are maintained as evidence for amount shown in TRAN-1/2 filed now.

c) If notice is issued, power of department to issue notice for TRAN-1/2 may be argued
d) Credits missed out in ER-1/ST-3 claimed in TRAN-1/2
e) Doctrine of legitimate expectation and credit being vested right may be used for arguing against ineligibility of credit

Consultancy perspective:

a) In litigation-prone cases such as claim of missed out credits or TRAN credit of rejected refund amount, it may be advised to the client to opt for refund/TRAN-1 after taking into consideration the facts of the case and risks involved in all options.
b) The risk appetite of the client also needs to be taken into account while providing advisory.

Audit/Compliance perspective:

a) Whether the client has claimed any missed-out credits/cess credit/credit of refund rejected.
b) Risk analysis of the client to be done while providing our suggestions

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