



 [Click to Print](#)

[Click to Close](#)

Transitional Credit: A Taxpayer's Struggle

MAY 18, 2020

By Shweta Jain Gupta, Partner, and Ms Anushka Jain, Associate, RSA Legal Solutions



THREE recent decisions, one by the Delhi High Court, the second by the Bombay High Court and the third by the Rajasthan High Court, tell an interesting, yet conflicted, story about the plight of the taxpayers who are still struggling to transfer the transitional credits into the GST regime.

Before deconstructing the decisions pronounced by the aforesaid High Courts and harking back on the debate, it is significant to examine the relevant provisions to bring out the issue at hand.

Relevant provisions and the issue in brief:

In terms of Section 140(1) of the CGST [Act, 2017](#) ('CGST Act'), a taxpayer is entitled to take, in his electronic credit ledger, the amount of CENVAT credit ('transitional credit') which is lying unutilized in the Service Tax / Central Excise return filed for the period ending June 30, 2017. Rule 117(1) of the CGST [Rules, 2017](#) ('CGST Rules') prescribes a time period of 90 days to file a declaration in Form GST TRAN - 1 to claim the aforesaid transitional credit. The said time period was extended till December 27, 2017 vide various notifications.

However, owing to the teething technical problems with the GST network (GSTN), many taxpayers were unable to file Form GST TRAN - 1 within the stipulated time period. Therefore, the Government introduced Rule 117(1A), by virtue of which the time period to file GST TRAN - 1 was extended till March 31, 2019 for taxpayers who tried filing their GST TRAN - 1 electronically by December 27, 2017 but could not do so due to *"technical difficulties on the common portal"*. The aforesaid period was further extended till March 31, 2020.

Given the above, several Writ Petitions have been filed before the High Courts by taxpayers who were unable to file the same due to a variety of other reasons (such as lack of technical skills, technical difficulties with their internet or computer, personal difficulties or ignorance) for transitioning of credit after December 27, 2017.

Decision by the Delhi High Court in Brand Equity

While dealing with a batch of such petitions, the Delhi High Court in the case of *Brand Equity Treaties Limited vs The Union of India and Ors.* - [2020-TIOL-900-HC-DEL-GST](#) read down Rule 117 of the CGST Rules as being directory in nature, insofar as it prescribes the time-limit for transitioning of credit. The findings of the High Court are as under:

- Rule 117 of the CGST Rules is directory in nature and cannot become an obstacle to Section 140 of the CGST Act, which entitles the taxpayer to transfer the transitional credit. The Court further observed that Rules are framed to provide procedural assistance to the taxpayers and cannot restrict the substantive rights provided in the Act by imposing a time limit;
- The CENVAT credit accumulated during the erstwhile tax regime was an accrued right of the registered person and is thus a vested property of the said person under Article 300A of the Indian Constitution. The CGST Rules, being subordinate in nature, cannot take away this right by fixing a time limit;
- The term *"technical difficulties on the common portal"* as mentioned in Rule 117 (1A) is a very broad term and cannot merely mean faults that have been logged on the GST common portal. The same also includes various difficulties occurring on part of the registered persons which should be given appropriate consideration;

- CENVAT credit cannot be availed in perpetuity, and in terms of the residuary provisions of the Limitation Act, all taxpayers would be allowed to file Form GST TRAN - 1 within a period of 3 years from the date of enactment of the CGST Act i.e., till June 30, 2020.

Decision by the Bombay High Court in Nelco Limited

It is pertinent to note that the Delhi High Court has taken a contrary view from the decision of the Bombay High Court in the case of *Nelco Limited vs UOI* - [2020-TIOL-641-HC-MUM-GST](#). In the said case, the Bombay High Court upheld the time limit stipulated under Rule 117 by holding the following:

- The power to prescribe time period for transitioning of credit under Section 140(1) of the CGST Act can be traced back to Section 164, which empowers the Government to make rules for carrying out the provisions of the CGST Act.
- The accumulated credit is only a concession available to the taxpayer and cannot be claimed as a right.
- Rule 117 is neither violative of Article 14 of the Indian Constitution nor can it be termed as arbitrary or unreasonable.
- The meaning of the term "*technical difficulties on the common portal*" mentioned in Rule 117(1A) includes only those cases where the technical error has been logged into the GST common portal. Therefore, unless the registered person is able to provide evidence with respect to the technical failure of the GST portal, no relief can be granted under Rule 117 (1A).

Decision by the Rajasthan High Court in Shree Motors

Similarly, in the case of *Shree Motors Vs. UOI* - [2020-TIOL-924-HC-Raj-GST](#), the High Court of Rajasthan has held that the Court had laid down certain parameters for grant of relief to the petitioners and it has been found that there were no evidences by the petitioner of having tried to file the Form GST TRAN - 1 within the given time frame. The theory of vested rights and its implication of limitation on the said aspect of vested right has been considered by Hon'ble Supreme Court in the case of *Osram Surya (P) Ltd.* - [2002-TIOL-64-SC-CX](#), wherein while considering the proviso II to Rule 57G of the Act of 1944 it was laid down that by providing limitation, the statute has not taken away any of the vested rights, which accrue to the manufacturers and what is restricted is the time, within which, the manufacturer as to enforce that right and, therefore, once the provisions of Rule 117 of the CGST Rules, which prescribe limitation has been upheld, the plea raised pertaining to the denial of vested right on account of petitioners failing to submit/file Form GST TRAN - 1 in time cannot be countenanced.

Amendment to Section 140(1) of the CGST Act

All the above debate is on account of the fact that there is no time limit prescribed in section 140(1) *per se* but it is prescribed in rules. Therefore, the Government proposed the amendment of Section 140(1) to mention the words "*within such time*" vide Section 128 of the Finance Act, 2020. This would essentially mean that Section 140 (1) would allow the prescription of the time limit through rules. Also, it is important to note that, this section 128 allowed retrospective applicability from July 2017 onwards. This section 128 of the Finance Act, 2020 has come into force today, the 18th May 2020 in view of notification [43/2020-CT](#) dated 16 May 2020.

Concluding remarks

In light of the amendment, it is clear that the Government intends to provide relief only in those cases wherein the taxpayers tried filing their GST TRAN - 1 electronically by December 27, 2017 but could not do so due to "*technical difficulties on the common portal*". Therefore, it is likely that the Department may challenge the decision of the Delhi High Court before the Supreme Court *inter alia* on the ground that the infirmities in the CGST Act, if any, shall stand cured upon the notification of section 128 of the Finance Act, 2020.

However, given the Delhi High Court had read down Rule 117 on several other grounds, the final decision of the Supreme Court is highly anticipated, and it remains to be seen if the taxpayers would see light at the end of the tunnel, given the fact there are contradictory decisions by various High Courts.

[The views expressed are strictly personal.]

(DISCLAIMER : The views expressed are strictly of the author and Taxindiaonline.com doesn't necessarily subscribe to the same. Taxindiaonline.com Pvt. Ltd. is not responsible or liable for any loss or damage caused to anyone due to

 **Click to Print**

Click to Close