

Epiphany by the Madras High Court in TRAN-1 debate

Compendium

- The issue regarding the availment of transitional credit from erstwhile law to GST has become the most contentious topic. The heated debate whether the time limit for availment of transitional credit is mandatory or directory in nature has become more far-reaching.
- Section 140 of the Act deals with Transitional Credit and Rule 117 of the Rules imposes time limit for filing TRAN-1 form.
- Section 140, as originally enacted, stated that Transitional Credit can be availed 'in such manner as may be prescribed'.
- Various assessees contended that this phrase excluded the power to impose time limits for transitioning the credit and consequently, Rule 117 is ultra vires Section 140 and is merely directory in nature.
- Consequently, the Section 140 was amended by Finance Act 2020, with retrospective effect from 01-07-2017, inserting the phrase 'within such time' thereby giving statutory power for enacting Rule 117 and with the intent to make the time limit mandatory in nature.
- Prior to this amendment, various High Court decisions, without dealing with the vires of Rule 117, had held the Rule imposing time limit to be merely directory and not mandatory



A. Recent Judgment by the Madras High Court¹

In the two writ petitions, the constitutional validity of the retrospective amendment to Section 140 of the Central Goods and Services Tax Act, 2017 (CGST Act), and Rule 117 of the CGST Rules were challenged.

The petitioner has sought to distinguish the said judgment on the following grounds:

- a. *The availment of Input Tax Credit should be distinguished from the transition and utilization of the Input Tax Credit.*
- b. *Once an assessee avails of the Input Tax Credit by complying with all conditions relating thereto, a vested right accrues in favor of such assessee. Consequently, such vested right of Input Tax Credit cannot be divested by a subsequent enactment.*

B. Grounds

The petitioner contended on below-mentioned grounds:-

- Section 174(2)(c)² of the CGST Act, which protects such vested rights.
- In support of his submissions, the petitioner relied upon the **CENVAT Rules, 2004** and in particular **Rule 14**, which provides that CENVAT credit can only be taken away when it has been wrongly availed as per the said Rule 14.

¹ Case Name : **Amplexor India Private Limited Vs Union of India (Madras High Court)** W.P. No. 10344 of 2020 dated 07/08/2020

² **174 Repeal and saving**

(2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as “such amendment” or “amended Act”, as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not—

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended

Acts: Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

- The petitioner has also relied upon the judgments of the Apex Court and other High Courts in the cases of
 - ✓ *Eicher Motors Limited v. Union of India reported in 1999 (106) ELT 3 (SC);*
 - ✓ *Collector of Central Excise, Pune v. Dai Ichi Karkaria Limited, reported in 1999 (112) ELT 353 (SC);*
 - ✓ *Malladi Drugs and Pharmaceuticals Limited v. Union of India reported in 2015 (323) ELT 489 (Mad.);*
 - ✓ *Siddharth Enterprises v. Nodal Officer, reported in 2019 (29) GSTL 664 (Guj.);*
 - ✓ *Adfert Technologies Private Limited v. Union of India reported in 2020 (32) GSTL 726 (P&H) and*
 - ✓ *Union of India and others v. Adfert Technologies Private Limited, S.L.P.(C) No.4408 of 2020, dated 28.02.2020*, which arose out of the judgment of the Punjab and Haryana High Court in *Adfert Technologies Private Limited*.
- In addition, the petitioner adverted to the statement of objects and reasons of the CGST Act in order to contend that the primary object was to prevent the cascading of taxes and that the relevant provisions viz., Section 140 of the CGST Act and Rule 117 of the CGST Rules should be interpreted by keeping in mind the said object and purpose.
- Learned Additional Solicitor General, in response, referred to the judgments of the Apex Court in the case of:-
 - ✓ *Osram Surya (P) Limited v. Commissioner of Central Excise, Indore, reported in (2002) 9 SCC 20 and*
 - ✓ *Samtel India Limited v. Commissioner of Central Excise, Jaipur, reported in (2003) 11 SCC 324* to contend that conditions may be imposed for availing a vested right. He also requested time to

obtain instructions in this matter and file a counter-affidavit.

- Upon consideration of the submissions the following questions arise for consideration in these writ petitions:

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- I. *Whether Input Tax Credit is a vested right and therefore, whether the imposition of a time limit for transitioning or utilization thereof is constitutionally impermissible?*
 - II. *Whether the time limit imposed in Rule 117 of the CGST Rules is mandatory or directory?*
 - III. *Whether Section 140 of the CGST Act read with Rule 117 of the CGST Rules divests the assessee of an alleged vested right or whether it prescribes conditions relating to the enforcement of such right?*
 - IV. *Whether the assessee has a legitimate expectation that the Input Tax Credit availed under the erstwhile tax regime should be permitted to be transitioned to the new tax regime without imposing a time limit?*
 - V. *Whether the deprivation of the benefit of transitional Input Tax Credit would amount to double taxation of the assessee as alleged?*
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C. High Court decisions are binding on other High Courts?

- The relevant constitutional provisions dealt with are Article 226(1) and Article 226(2) of the Constitution of India, 1950.
- **Article 226(1)** confers power on the High Courts to issue writs for enforcing fundamental rights, or for any other purposes. Such power can be exercised by the High Court '*throughout the territories in relation to which it exercises jurisdiction*'.
- **Article 226(1)** further provides that the writs can be issued to '*any person or authority, including in appropriate cases, any Government, within those territories*'.
- **Article 226(2)** states that the power conferred by Article 226(1) may be exercised by any High Court under whose territorial jurisdiction the whole or part of the cause of action arises.
- Now, **Article 141** of the Constitution of India provides that the law declared by the

Supreme Court shall be binding on all courts within the territory of India.

- But as regards the application of Precedents of the High Courts there is no direct Constitutional provision as Article 141.
- In *M/s. East India Commercial Co. Ltd. Calcutta and Another v. Collector of Customs, Calcutta 1962 (5) 23 - SUPREME COURT OF INDIA*, wherein the Supreme Court held that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence.
- Conflicts on an issue between the Benches of High Courts even within a High Court have been witnessed in many a case. In such a case the same would be referred to as a Larger Bench or it would be decided by Supreme Court.
- In '*Valliamma Champaka Pillai V. Siuvathanu Pillai*' – 1979 (8) 210 - SUPREME COURT, it was held that it is well settled that the decision of one High Court is not binding precedent upon another High Court and at best can only have persuasive value.
- Now, in the case of *Kusum Ingots & Alloys Ltd. v. Union of India*, (2004) 6 SCC 254, the Supreme Court while giving the ***Observations regarding extraterritorial applicability of High Court orders*** cited that:-

'22. The Court must have the requisite territorial jurisdiction. An order passed on a writ petition questioning the constitutionality of a parliamentary Act, whether interim or final keeping in view the provisions contained in clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.'
- As the *ratio decidendi* of *Kusum Ingots* culled out hereinabove Para was clearly '*obiter dictum*'.
- The *Obiter Dictum* in *Kusum Ingots* mentioned above is problematic since it

does not conform to the constitutional mandate of Article 226 of the Constitution.

- However, although the *obiter dictum* of the Supreme Court should be accepted as binding by High Courts, it does not mean that every statement contained in a judgment of the Supreme Court would be attracted by Article 141.
- It was further held that '*Statements on matters other than law have no binding force.*'

D. Analysis of previous judgment by the Madras High Court

Views for 'Timeline is given for filing TRAN-1' is Mandatory

- In the case of *M/s. P. R. Mani Electronics v. Union of India and others*³ the Madras High Court upheld the validity of Rule 117 of the CGST Rules.
- In light of the judgment of the Supreme Court in *JAYAM & CO. VERSUS ASSISTANT COMMISSIONER & ANR.*
 - ✓ ITC is the property of the Petitioner cannot be countenanced and ITC has to be construed as a concession.
- In addition, it is evident that ITC cannot be availed of without complying with the conditions prescribed in relation thereto.
- Prior to the amendment to Section 140 of the CGST Act, the power to frame rules fixing a time limit was arguably not traceable to the unamended Section 140 of the CGST Act, which contained the words "in such manner as may be prescribed", because such words have been construed by the Supreme Court in cases such as *Sales Tax Officer Ponkuppam v. K.I. Abraham [(1967) 3 SCR 518]* as not conferring the power to prescribe a time limit.
- It was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rulemaking powers

except that such rules should be for the purpose of giving effect to the provisions of the CGST Act.

- A fortiori, upon amendment of Section 140 by introducing the words "within such time", the power to frame rules fixing time limits to avail Transitional ITC is settled conclusively.
- In SKH Sheet Metals, the Delhi High Court concluded, in **paragraph 26**, that the statute had not fixed a time limit for transitioning credit by also referring to the repeated extensions of time.
- Given the fact that the power to prescribe a time limit is expressly incorporated in Section 140, which deals with Transitional ITC, and Rule 117 fixes such a time limit, we are unable to subscribe to this view. The fact that such a time limit may be extended under circumstances specified in Rule 117, including Rule 117A, does not lead to the sequitur that there is no time limit for transitioning credit.
- In this context, reference may be made to Section 16(4) of the CGST Act which provides as follows:

"Section 16(4): A registered person shall not be entitled to take the input tax credit in respect of any invoice or debit note for the supply of goods or services or both after the due date of furnishing of the return under Section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier."
- The above provision is indicative of the legislative intent to impose time limits for availing ITC.
- In the context of Transitional ITC, the case for a time limit is compelling, and disregarding the time limit and permitting a party to avail Transitional ITC, in perpetuity, would render the provision unworkable. In this regard, we

³ P.R. Mani Electronics Vs Union of India (Madras High Court) WP No. 8890 of 2020 dated 13/07/2020

concur with the conclusion of the Bombay High Court in the case of NELCO Ltd. vs. UOI & Ors that both ITC and Transitional ITC cannot be availed of except within the stipulated time limit.

- Such time limits may, however, be extended through statutory intervention. As stated earlier, in SKH Sheet Metals, the Delhi High Court observed that ITC is the heart and soul of GST legislations in as much as such legislations are designed to prevent the cascading of taxes.
- There can be no quarrel with this conceptual position; however, it is not a logical corollary thereof that time limits for availing ITC and, in particular, Transitional ITC, are inimical to the object and purpose of the statute.
- In judgments such as *Union of India A.K. Pandey [(2009) 10 SCC 552]* and *Bachhan Devi v. Nagar Nigam [(2008) 12 SCC 372]*, the Supreme Court held that the use of words such as “shall” or “may” are not conclusive or determinative of the mandatory or permissive nature of a provision.
- In *C. Bright v. The District Collector, [2019 SCC Online Mad 2460]*, after considering a number of judgments of the Supreme Court, a Division Bench of this Madras High Court captured the relevant factors to determine whether a provision is a directory or mandatory.
- In summary, those factors are:
 - I. The use of peremptory or negative language, which raises a rebuttable presumption that the provision is mandatory;*
 - II. The object and purpose of the statute and the provision concerned; the stipulation or otherwise of the consequences of non-compliance;*
 - III. Whether substantive rights are affected by non-compliance; whether the time limits are in relation to the exercise of rights or availing of concessions;*

IV. *Whether they relate to the performance of statutory duties. In this case, the peremptory word “shall” is used. The relevant rule deals with the time limit for availing Transitional ITC by carrying it forward from the credit balance under tax legislation which has been repealed and replaced by the CGST Act.*

- Thus, the object and purpose of Section 140 clearly warrant the necessity to be finite. ITC has been held to be a concession and not a vested right. In effect, it is a time limit relating to the availing of a concession or benefit.
- If construed as mandatory, the substantive rights of the assessee would be impacted; equally, if construed as directory, it would adversely impact the Government’s revenue interest, including the predictability thereof.
- On weighing all the relevant factors, which may not be conclusive in isolation, in the balance, we conclude that the time limit is mandatory and not a directory.

Our Views

At present, this issue is sub judice with the Supreme Court staying the operation of the Delhi HC decision in the case of ‘Brand Equity’. We hope that the SC will consider the hardship of various assesses and pronounce judgement in the favour of assesses.

Given the fact that GST is in the "trial & error" phase, the registered persons who wish to transit their credits should be given a reasonable time. Thus, in our opinion imposing stringent timelines under such law is unreasonable ultimately lead to deprivation of such ITC to such person.



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