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## Transitional provisions - Counting chickens before they hatch!

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**TRANSITING** CENVAT Credit into GST has been a turbulent journey. GST Law is not easy to understand and interpret. Provisions relating to transition of credit have not proved to be any exception and are not free from complexities.

Section 140 of the CGST Act (Act) deals with transitional arrangement for Input Tax Credit. Section 140 takes note of several situations and deals with such situations in its several sub-sections. Sub-section (1) deals with transiting CENVAT Credit in balance as on 30th June 2017. Sub-section (2) deals with transition of un-availed CENVAT Credit on Capital Goods. Sub-section (3) deals with Credit of duties in respect of Inputs held in stock.

Explanation 1 to Section 140 of the Act defines the expression "*eligible duties*". This expression "*eligible duties*" is used in Sub-section (1), (3), (4) and (6) of Section 140 of the Act.

Explanation 2 to Section 140 of the Act defines the expression "*eligible duties and taxes*". This expression is used only in Sub-section (5) of Section 140 of the Act.

Explanation 1 to Section 140 of the Act is applicable only to sub-sections (3), (4) and (6) and Explanation 2 to Section 140 of the Act is applicable only to sub-section (5). These Explanations have never been made applicable to Sub-section (1) of Section 140 of the Act because these Explanations are expressly applicable only to the Sub-sections specified therein.

Section 140 of the Act has seen several amendments, be them prospective or retrospective.

One cannot lose sight of Circular No. [87/06/2019-GST](#) dated 2 nd January 2019 where the Central Board of Indirect Taxes and Customs has clarified as follows:

*"5. 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."*

The Circular shows Board's understanding of the provisions of Section 140 of the Act. The circular apparently reveals the true intention of the Government, which has not been achieved by the aforementioned amendments in law.

The Hon'ble Bombay High Court, by Order dated 29.10.2021, in WP 3226 of 2019 - [2021-TIOL-2112-HC-MUM-GST](#), while deciding a challenge to the Show Cause Notice proposing to deny and recover transition of, *inter alia*, Education Cess and Secondary and Higher Education Cess, has held that the Revenue Department has no Jurisdiction to disallow transition of CENVAT balance of such Cesses under Section 140(1) of the Act and the Show Cause Notice has been set aside.

The Hon'ble Bombay High Court took note of the fact that several amendments were proposed by Section 28 of the CGST Amendment Act, 2018 (Amending Act), in Section 140 of the Act.

"28. In section 140 of the principal Act, with effect from the 1<sup>st</sup> day of July, 2017,-

(a) In sub-section (1), after the letters and word "CENVAT credit", the words "of eligible duties" shall be inserted and shall always be deemed to have been inserted;

(b) In the Explanation 1-

(i) for the word, brackets and figures "sub-sections (3), (4)", the word, brackets and figures "sub-sections (1), (3), (4)" shall be substituted and shall always be deemed to have been substituted;

(ii) clause (iv) shall be omitted and shall always be deemed to have been omitted;

(c) in the Explanation 2-

(i) for the word, brackets and figure "sub-section (5)", the words, brackets and figures "sub-sections (1) and (5)" shall be substituted and shall always be deemed to have been substituted;

(ii) clause (iv) shall be omitted and shall always be deemed to have been omitted;

(d) after Explanation 2as so amended, the following Explanation shall be inserted and shall always be deemed to have been inserted, namely:-

*"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."*

In terms of Section 1(2) of the Amending Act, the provisions of the Amending Act would come into force on the date to be notified by the Central Government.

Curiously, by Notification No. [02/2019-Central Tax](#) dated 29th January 2019, the Central Board of Indirect Taxes and Customs notified all the provisions of Section 28 of Amending Act **except**, inter alia, sub-clause (i) of clause (b) and sub-clause (i) of clause (c) of Section 28 of the Amending Act. Even, till date, the Board has not notified the above provisions.

Thus, Explanation 1 and 2 are not applicable to Sub-section (1) of Section 140 of the Act and even as of today in absence of the provisions having been notified, they are not enforceable.

The Hon'ble Bombay High Court has further held that Explanation 3 does not have any application to Sub-section (1) of Section 140 of the Act, because it defines the expression *"eligible duties and taxes"* as distinguished from expression *"eligible duties"* used in Sub-section (1) of the Section 140 of the Act.

If amendment to Explanation 1 by Section 28 of the Amending Act is notified and the said Explanation is made applicable to Sub-section (1) of Section 140 of the Act, disastrous effect of the same would be outright denial of transition of balance of CENVAT Credit of Service Tax as well. This is probably the reason why these amendments have not been notified.

A battle *royale* lies ahead!

**[The views expressed are strictly personal.]**

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