



Transition credit can be availed by 30 June 2020

Brand Equity Treaties Limited versus Union of India – Delhi High Court¹

The Delhi High Court on 5 May 2020 decided a batch of writ petitions wherein the petitioner were seeking permission to avail transition credit by filing TRAN – 1 beyond the period of 90 days as is prescribed in Rule 117 of the Central Goods and Service Tax Rules, 2017 ('CGST Rules').

Our alert provides analysis of the judgment pronounced by the Delhi High Court.

Summary of the judgment

- The following specific questions were determined in the above judgment:
 - Whether the Government could curtail an accrued and vested right and restrict its availment to 90 days by a subordinate legislation?
 - What does the phrase “technical difficulty on the common portal” imply?
 - Is the extension of time limit to avail transition credit for a selective group of persons, discriminatory?

- Whether Rule 117 of the CGST Rules is mandatory or directory?

- It was observed that Section 140 of the Central Goods and Service Tax Act, 2017 ('CGST Act') presupposes that transition credit has accrued and is recorded in the credit register as it existed pre-GST and enables the transition credit to be carried forward to GST. However, neither Section 140 nor any other provision of the CGST Act prescribes a time limit for transition of credit and the time limit of 90 days is introduced by Rule 117 of the CGST Rules. The Court held that there was no rationale for the time limit of 90 days and that petitioners should not be deprived of their right to credit on such unreasonable grounds when, the Limitation Act, 1963 allows civil rights to be enforced within 3 years from date of commencement of limitation.
- Further, the time limit in Rule 117 of the CGST Rules is not sacrosanct as the proviso to Rule 117 of the CGST Rules empowers the Commissioner to extend the time limit to avail transition credit, which [in certain instances] has been extended for taxpayers who have encountered “technical difficulty on the common portal”. The court did not concur with the view of the department that the

¹ W.P (C) 11040/2018 – Delhi High Court



extension should be restricted to those taxpayers who have encountered technical difficulty on the portal as the phrase is not defined and “technical difficulty” is too board a term. The court held that it should include technical difficulties faced by the taxpayers as well, given that it was a new system and the portal at large was not equipped for voluminous fillings. The court even took into consideration that many taxpayers across India do not have access to the internet and are not acquainted with online filing etc.

- In the context of extension of time limit to avail transition credit for selective group of persons. The court held that it would be erroneous to emphasis on technical glitches on the portal as a pre-condition and that such a view is not in line with the purpose of Rule 117 of the CGST Rules. The approach adopted by the department should be fair, reasonable and should pass the muster of Article 14 of the Constitution of India. There were errors on the GST portal as well, and the Government cannot adopt a different yardstick while evaluating the conduct of taxpayers. The time limit prescribed for availing transition credit cannot be discriminatory and unreasonable. If there is no rationale for such distinction, it will be violative of Article 14 of the Constitution.
- Lastly, the submissions that Rule 117 of the CGST Rules specifies the mechanism for availing the credits which is procedural and directory, and cannot affect the substantive right of the registered taxpayer to avail of the existing / accrued and vested CENVAT credit was upheld to be meritorious. The procedure in the CGST Rules could not run contrary to the substantive right vested under sub-section (1) of Section 140 of the CGST Act. Rule 117 of the CGST Rules is read down as directory in nature.

Judgment

- The Court concluded that the CENVAT credit which stood accrued and which was vested property of the taxpayer, is a Constitutional right under Article 300A of the Constitution. The same cannot be taken away

merely by way of delegated legislation by framing rules, without there being any overarching provision in the CGST Act.

- In the conclusion to the judgment, it is clarified that although Rule 117 of the CGST Rules is directory in nature, it does not mean that transition credit can be availed in perpetuity. Transitory provisions, as the word indicates, have to be given its due meaning. In absence of any specific provisions under the Act, it was held that in terms of the residuary provisions of the Limitation Act,1963 the period of three years should be the guiding principle and thus a period of three years from the appointed date would be the maximum period for availing of such credit i.e. 30 June 2020.

Dhruva Comments

The decision of the Hon’ble High Court becomes important considering that the said decision has in detail deliberated on the Constitutional validity of the discrimination made only for taxpayers who have faced technical glitches, under Article 14 of the Constitution of India, and held the discrimination to be arbitrary. The Hon’ble High Court has also held that the accumulated CENVAT credit is the property of the taxpayer and a Constitutionally protected right under Article 300A of the Constitution and that substantive rights cannot be denied because of procedural issues. The decision also specifically mentions that other taxpayers who are similarly situated should be entitled to avail the benefit of the decision, thereby, extending the benefit to even taxpayers who may not be Petitioners in the current Writ.

The relief to avail transition credit is granted by way of direction to the respondent department to open the online portal for filing of the TRAN – 1 online or accept the same manually.

While the decision is a welcome one, it does not completely resolve the issues regarding availment of transition credit, considering that some of the other High Courts² have taken a contrary view whereby, the filing of TRAN -1 has only been allowed for technical glitches faced by a taxpayer. In addition, the decision has not dealt with the retrospective amendment made to

² Nelco Limited [2020-VIL-143-BOM]



Section 140 vide the Finance Act 2020, that has now added the phrase “*within such time*” in the main provisions. It is likely that the authorities may challenge the decision before the Supreme Court and may not open the GSTN portal before 30 June 2020.

Way forward

It is advisable to claim the transition credit by way of GSTR-3B, irrespective of the jurisdiction in which the taxpayer is located, and file a letter with the authorities to state that the same is being done in line with the decision of the Delhi HC and, due to TRAN -1 filing not being activated. Legal arguments should be put forth as to why the credit ought to be made available. The said credit may not be utilised till the matter attains finality. If the values involved are large, petitions may be filed with the jurisdictional High Court taking support of the Delhi High Court decision.

In terms of the time limit of 30 June 2020, the interplay of this judgment and the decision of the Supreme Court extending all limitations statutory or otherwise may be considered.





ADDRESSES

Mumbai

11th Floor, One IndiaBulls Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahlanagar, Corporate Road,
Ahmedabad - 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana - 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune - 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal – 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

New York

Dhruva Advisors USA, Inc.
340 Madison Avenue, 19th Floor, New York,
New York 10173 USA
Tel: +1-212-220-9494

KEY CONTACTS

Dinesh Kanabar (Mumbai)

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia (Mumbai)

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri (Mumbai)

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani (Mumbai)

ranjeet.mahtani@dhruvaadvisors.com

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