Ghost of Retrospective legislation in GST

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"Retrospective tax is a matter of past. That chapter will not be opened again. We are ensuring that neither this government nor the future governments can open this chapter" – Prime Minister Shri. Narendra Modi while addressing India France Business Summit in January 2014.

Everybody would agree that retrospective legislation in tax matters, imposing a burden with a retrospective effect is very hard to swallow. But, the Government is adept in using this weapon to get over the Judgements of Courts, which are not to the liking of the Government. But the above words coming from none other than the Prime Minister of the country was re-assuring. But alas!

When a mammoth tax reform like introduction of GST happens, there is bound to be lot of wrinkles in the legislation, which needs judicial intervention. When the judiciary irons out such wrinkles, it has to be gracefully accepted by the Government and any corrective action should be done only prospectively. If the weapon of retrospective legislation is wielded, it will create a complete lack of trust, economic havoc and all-round uncertainty.

How many times the above words of the Prime Minister has been thrown to wind in GST law, within around two years of its introduction?

Transitional Credit of Education Cess, Secondary and Higher Education Cess and Krish Kalyan Cess.

The above CESSes of the legacy era are entitled to Cenvat Credit, with a restriction that credit of such CESSes can be used only for payment of respective CESSes. As on 30.06.2017 all taxpayers would have had balance of credit of these CESSes as per the returns filed for the period upto June 2017, which, but for the introduction of GST from 01.07.2017, could have been validly carried forwarded and utilised.

Section 140 of the CGST Act, 2017 contains various transitional provisions relating to carrying forward of the balance of Cenvat Credit into GST regime, subject to various procedures and conditions.

As per sub-section (1) of Section 140, the balance of credit of "eligible duties" as per the last return under legacy laws filed by them. The term "eligible duties" used in the said sub section has not been defined. As the balance of credit of the above CESSes are validly earned under the legacy laws, obviously, the same could be allowed to be carried forwarded into GST regime under Section 140 (1) ibid. If at all it was the intention of the Government not to allow the balance of credit of such CESSes, the same should have been clearly provided for under the transitional provisions. In the absence of any express restrictions in this regard, all taxpayers have carried forwarded the balance of credit of such CESSes as balance of CGST credit in GST regime and used the same for payment of GST.

Vide Section 28 of the CGST (Amendment) Act, 2018 certain amendments have been made in Section 140 of the CGST Act, 2017, one among them being introduction of the following Explanation, with retrospective effect from 01.07.2017.

> *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.*

By virtue of this retrospective amendment the transitional credit of Education Cess, Secondary and Higher Education Cess and Krish Kalyan Cess, carried forwarded into GST regime by taxpayers under Section 140 of the CGST Act is not entitled and has to be paid back.

(Even this retrospective amendment has been done with errors. The term "eligible duties" is used in sub sections (3), (4), (5) and (6) of Section 140 of the Act. The said term, used in the above sub sections has also been defined by listing out the duties which are entitled for transitional credit under these sub sections. These sub sections allow transitional credit in respect of inputs lying in stock in different circumstances. These definitions did not include CESSes. The definition of "eligible duties" under the above sub sections has also been made applicable to sub section

(1) which deals with balance of credit as per the last return under legacy law. By virtue of this amendment, the tax payer would not be entitled to carry forward the entire balance of eligible duties as per the last return, but would be entitled to carry forward only such amount of credit, that is attributable to the inputs lying in stock as on 30.06.2017, which was never the intention. In order to circumvent and camouflage this error, the Government has surreptitiously refrained from notifying these amendments).

Restriction of inverted duty structure refund for input services.

Section 54 (3) provides for refund of "any unutilised input tax credit at the end of the tax period" in two situations.

> *(i) zero rated supplies made without payment of tax;*
>
> *(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council*

Where the rate of tax on inputs is higher than the rate of tax on output supplies, the situation is known as inverted duty structure and if there any accumulation of credit due to such inverted duty structure the "unutilised input tax credit" can be claimed as refund. It may be observed from the above that once there is an inverted duty structure with reference to any input, then the entire unutilised input tax credit, including the credit availed on input service can be claimed as refund.

The formula for claiming such refund has been prescribed in Rule 89 (5) of the CGST Rules, 2017 as,

> *Maximum Refund Amount = {(Turnover of inverted rated supply of goods) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods*
>
> *Explanation. — For the purposes of this sub rule, the expressions "Net ITC" and "Adjusted Total turnover" shall have the same meanings as assigned to them in sub-rule (4).*
>
> *As per Rule 89 (4) "Net ITC" means input tax credit availed* ***on inputs and input services*** *during the relevant period.*

Vide Notification 21/2018 C.T. Dt. 18.04.2018, the refund is restricted only in respect of the input tax credit availed on inputs, by substituting a new sub rule (5) in Rule 89,

> *"(5). In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula :-*
>
> *Maximum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.*
>
> *Explanation :- For the purposes of this sub-rule, the expressions -*
>
> *(a) "Net ITC" shall mean input tax credit availed **on inputs** during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and*
>
> *(b) "Adjusted Total turnover" shall have the same meaning as assigned to it in sub-rule (4).*

Subsequently, the above amendment has been made with retrospective effect vide Notification 26/2018 C.T. Dt.13.06.2018, by once again substituting a new sub rule (5) in Rule 89 with effect from 01.07.2017

> *with effect from 1st July, 2017, in rule 89, for sub-rule (5), the following shall be substituted, namely :-*
>
> *"(5) In the case of refund on account of inverted duty structure, refund of input tax credit shall be granted as per the following formula :-*
>
> *Maxi mum Refund Amount = {(Turnover of inverted rated supply of goods and services) x Net ITC ÷ Adjusted Total Turnover} - tax payable on such inverted rated supply of goods and services.*
>
> *Explanation : - For the purposes of this sub-rule, the expressions -*
>
> *(a) Net ITC shall mean input tax credit availed on inputs during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both; and*
>
> *(b) Adjusted Total turnover shall have the same meaning as assigned to it in sub-rule (4).*

All those tax payers, who have already claimed refund of input tax credit in respect of input services, have to pay back the same.

Status of GSTR 3 B.

Section 16 (4) of the CGST Act, 2017 reads as below.

> *16 (4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for 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 financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.*

The return under Section 39, referred to above is GSTR 3, the filing of which has been indefinitely deferred. Instead, another simple summary return for GSTR 3 B has been prescribed vide Rule 61 (5).

> *(5) Where the time limit for furnishing of details in **FORM GSTR-1*** under section 37 and in **FORM GSTR-2*** under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify the manner and conditions subject to which the return shall be furnished in **FORM GSTR-3B*** electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.*

It may be noted that GSTR 3 B is not a return referred to under Section 39. Further, the due date for filing annual return for the year 2017-18 has been extended upto 30.11.2019.

Thus, by a conjoint reading of Section 16 (4) it is quite reasonable to conclude that any input tax credit pertaining to the year 2017-18, can be availed till filing of annual returns, as filing of GSTR 3 has been deferred indefinitely. And that is what the Hon'ble High Court of Gujarat has said in the case of AAP and Co Vs UOI – 2019 (26) GSTL 481 Guj.

Unable to appreciate the rationale, a new sub rule (5) has been substituted in Rule 61, with retrospective effect from 01.07.2017, vide Notification 49/2019 C.T. Dt. 09.10.2019, which reads as

for sub-rule (5), the following sub-rule shall be substituted, with effect from the 1st July, 2017 namely,

(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 or in FORM GSTR-2 under section 38 has been extended, the return specified in sub-section (1) of section 39 shall, in such manner and subject to such conditions as the Commissioner may, by notification, specify, be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

Provided that where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in FORM GSTR-3.

Thus the effect of the decision of the Hon'ble Gujarat High Court has been overcome with retrospective effect and those who have availed the input tax credit for the year 2017-18 after the due date for filing GSTR 3 B for September 2018 have to now repay the credit with interest.

Is it not tax terrorism and blatant violation of the assurance given by the Hon'ble Prime Minister?

Epilogue: If at all any retrospective amendment has to be done, it should be for the following proviso added in Section 50 of the CGST Act.

Provided *that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.*

The need for introducing the above proviso has been explained in the Agenda Note for 31st GST Council meeting in the following words.

3. A perusal of above provisions indicate that the law permits furnishing of a return without payment of full tax as self-assessed as per the said return but the said return would be regarded as an invalid return. The said return, however, would not be used for the purposes of matching of ITC and settlement of funds. Thus, although the law permits part payment of tax but no such facility has been yet made available on the common portal. This being the case, a registered person cannot even avail his eligible ITC as he cannot furnish his return unless he is in a position to deposit his entire tax

liability as self-assessed by him. This inflexibility of the system increases the interest burden.

The same is illustrated as below: Suppose a registered person has self-assessed his tax liability as Rs. 100/- for a particular tax period. He has an amount of Rs. 10/- as balance in his electronic credit ledger and he is eligible to avail Rs. 80/- as input tax credit (which would be credited to his electronic credit ledger only on furnishing of return). He is, therefore, required to pay only Rs. 10/- from his electronic cash ledger. The IT system will not allow the said registered person to furnish his return (and therefore the ITC of Rs. 80/- will not be credited in his electronic credit ledger) until he is in a position to discharge his complete self-assessed liability of Rs. 100/-. He would be liable to pay interest on the entire self-assessed tax liability of Rs. 100/- as he is not able to pay Rs. 10/- or part thereof from his electronic cash ledger.

It may be seen from the above that if the facility for part payment, as permitted under law, was available, the registered person would have been required to pay interest only on Rs. 10/- but presently he is liable for interest on entire tax liability of Rs. 100/-

6. The issue was deliberated by the Law Committee in its meeting held on 15.12.2018. The Committee observed that the proposal to charge interest only on the net liability of the taxpayer, after taking into account the admissible credit, may be accepted in principle. Accordingly, the interest would be charged on the delayed payment of the amount payable through the electronic cash ledger. However, where invoices/debit notes have been uploaded in statements pertaining to the period subsequent to the period in which they should have been uploaded, the interest shall be calculated on the amount of tax calculated on the taxable value from the date on which the tax on such invoices was due. This would require amendment to the Law.

Can there be a more genuine case for giving retrospective effect to the above proviso under Section 50?

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