

## **Bombay High Court on GST Transitional Credit – G. Natarajan**

Transition, in any domain is always a complex affair. When several taxes levied independently by the Union and the State Governments are unified under a single levy, the process is bound to be very complex and it is the duty of the Government to ensure a smooth transition in all aspects. One such aspect is the seamless transfer of credits earned under the existing laws into GST regime and Section 140 of the CGST Act provides for the same. Though the said section deals with several situations, the multitude of circumstances and myriad ways in which the need for transition of credit would arise cannot be predicted and provided for and it is where the Government has to be proactive and guide the process through the removal of difficulty powers. Unfortunately, more often than not, the Government is playing an adversarial role, rather than the role of a benefactor, be it coming out with series retrospective amendments to Section 140 or taking the legal battles right upto the doors of the Hon'ble Supreme Court.

One such issue is the eligibility to carry forward the balance of Cenvat Credit of Education Cess (EC), Secondary and Higher Education Cess (SHEC) and Krish Kalyan Cess (KKC), lying in balance with the taxpayers, as on 30.06.2017.

To recapitulate, these levies were introduced with the specific object of mobilising funds for specific purposes (albeit the fact that the huge amounts thus collected remained unutilised for the said purposes) and hence credit of these Cesses, could be used only for payment of respective Cesses and not for any other purpose. Even before the introduction of GST, EC and SHEC have ceased to exist and subsumed into Excise duty and Service Tax by enhancing these rates. But, the balance of credit of these Cesses have not been statutorily lapsed and hence these balances were carried forwarded in the returns upto 30.06.2017.

Section 140, as enacted originally, did not contain any restriction as to carrying forward the balance of EC, SHEC and KKC as on 30.06.2017 into GST regime and utilising the same for payment of GST liabilities and almost all taxpayers earnestly carried forwarded the balance of such Cesses into GST regime.

But, the Government was not in favour of it. Administratively, in the Guidance Note on Transitional Credit issued on 14.03.2018 by the CBIC it was stated that such Cesses cannot be carried forwarded. Judicially, Section 140 was sought to be amended through Section 28 of the CGST (Amendment) Act, 2018 retrospectively from 01.07.2017 so as not to allow transition of EC, SHEC and KKC into GST regime. 4 amendments have been proposed in Section 140, but two of such amendments, in Explanation 1 and 2 of section 140 are likely to lead to unintended consequences, due to poor drafting (These amendments, if put into effect would curtail the legitimate entitlement to carry forward the balance of credit to the extent of inputs in stock and inputs in transit). Instead of owning up the responsibility for such drafting gaffe and approaching the Parliament for suitable amendment, the draftsmen have chosen a devious method, of not notifying the faulty amendments. They thought that the Explanation 3, introduced in Section 140 alone would be sufficient to take care of the issue.

This is where the Bombay High Court has interpreted these amendments in the case of Godrej and Boyce Manufacturing Co. Ltd. (W.P. No. 3226 of 2019) and observed that while the Explanation talks of "eligible duties and taxes" and excludes the EC, SHEC and KKC from its ambit, the expression used in Section 140 (1) is "eligible duties" which is distinct. The High Court has held that Explanation 3 is not applicable while carrying forward the "eligible duties" as per the last return filed under the old law and the definition of "eligible duties" as per Explanation 1, which did not cover such Cesses, is not applicable for Section 140 (1).

Hopefully, the Government may come out with another retrospective amendment to once again rectify their mistake, a luxury, only the Government has.

The total amount of balance of such Cesses with all taxpayers may be few hundred crores. Why not the Government be little generous and allow their transition into GST regime without indulging in all gimmicks to bar such transition.

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<https://www.thehindubusinessline.com/business-laws/gst-transitional-credit-time-for-another-tweak/article37741283.ece>

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## GST transitional credit: Time for another tweak?

G NATARAJAN

Transition in any domain is always a complex affair. When several taxes levied independently by the Union and the State governments are unified under a single levy, the process is bound to be very complex and it is the duty of the government to ensure a smooth transition in all aspects. One such aspect is the seamless transfer of credits earned under the existing laws into the GST regime and Section 140 of the CGST Act provides for the same. Though the said section deals with several situations, the multitude of circumstances and myriad ways in which the need for transition of credit would arise cannot be predicted and provided for. Here is where the government has to be proactive and guide the process through the removal of difficulty powers. Unfortunately, more often than not, the government is playing an adversarial role, rather than the role of a benefactor, be it coming out with a series of retrospective amendments to Section 140 or taking the legal battles right up to the doors of the Supreme Court.

One such issue is the eligibility to carry forward the balance of Cenvat Credit of Education Cess (EC), Secondary and Higher Education Cess (SHEC) and Krish Kalyan Cess (KKC), lying in balance with the taxpayers, as of June 30, 2017. To recapitulate, these levies were introduced with the specific object of mobilising funds for specific purposes (albeit the fact that the huge amounts thus collected remained unutilised for the said purposes) and hence, credit of these cesses could be used only for payment of respective cesses and not for any other purpose. Even before the introduction of GST, EC and SHEC has ceased to exist and subsumed into excise duty and service tax by enhancing these rates. But the balance of credit of these cesses has not statutorily lapsed and hence these balances were carried forward in the returns up to June 30, 2017. Section 140, as enacted originally, did not contain any restriction as to carrying forward the balance of EC, SHEC

and KKC as of June 30, 2017 into the GST regime and utilising the same for payment of GST liabilities and almost all taxpayers earnestly carried forward the balance of such cesses into GST regime.

### Guidance note

But the government was not in favour of it. Administratively, in the guidance note on transitional credit issued on March 14, 2018 by the CBIC, it was stated that such cesses cannot be carried forward. Judicially, Section 140 was sought to be amended through Section 28 of the CGST (Amendment) Act, 2018 retrospectively from July 1, 2017 so as not to allow transition of EC, SHEC and KKC into GST regime. Four amendments have been proposed in Section 140 but two of such amendments, in explanation 1 and 2 of Section 140, are likely to lead to unintended consequences, due to poor drafting. Instead of owning up the responsibility for such drafting gaffe and approaching the Parliament for suitable amendment, the draftsmen have chosen the tricky method of not notifying the faulty amendments. They thought that explanation 3, introduced in Section 140 alone, would be sufficient to take care of the issue.

This is where the Bombay High Court has interpreted these amendments in the case of Godrej and Boyce Manufacturing Co Ltd (WP No. 3226 of 2019) and observed that while the explanation talks of "eligible duties and taxes" and excludes the EC, SHEC and KKC from its ambit, the expression used in Section 140 (1) is "eligible duties" which is distinct. The High Court has held that explanation 3 is not applicable while carrying forward the "eligible duties" as per the last return filed under the old law and the definition of "eligible duties" as per explanation 1, which did not cover such cesses, is not applicable for Section 140 (1). Hopefully, the government may come out with another retrospective amendment to once again rectify their mistake.

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