Treading the GST path – XLV

Recovery of disputed credits – Overstepping by CBIC

(G. Natarajan, Advocate, Swamy Associates)

1.0 Reference is invited to CBIC's Circular No. 33/7/2018 Dt. 23.02.2018 (appended below), in the matter of non utilisation of disputed credits. The said circular has been issued under Section 168 of the CGST Act, 2017, which reads as,

> ***168. Power to issue instructions or directions. —*** *(1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.*

1.1 Attention is particularly drawn to para 2 of the said Circular.

> ***2. Non-utilization of Disputed Credit carried forward***
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> *2.1 Where in relation to a certain CENVAT credit pertaining to which a show cause notice was issued under rule 14 of the CENVAT Credit Rules, 2004, which has been adjudicated and where in the last adjudication order or the last order-in-appeal, as it existed on 1st July, 2017, it was held that such CENVAT credit is not admissible, then such CENVAT credit (herein and after referred to as "disputed credit"), credited to the electronic credit ledger in terms of sub-section (1), (2), (3), (4), (5), (6) or (8) of section 140 of the Act, shall not be utilized by a registered taxable person to discharge his tax liability under this Act or under the IGST Act, 2017, till the order-in-original or the last order-in-appeal, as the case may be, holding that disputed credit as inadmissible is in existence.*
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> *2.2 During the period, when the last order-in-original or the last order-in-appeal, as the case may be, holding that disputed credit as inadmissible is in operation, if the said disputed credit is utilised, it shall be recovered from the tax payer, with interest and penalty as per the provisions of the Act.*

1.2 It may be observed from para 2 above, if any Order in Original (OIO) / Order in Appeal (OIA) has been passed prior to 01.07.2017, disallowing any cenvat credit, if such credit had been carried forwarded to GST under the transitional provisions, the same shall not be utilised and if utilised, the same can be recovered by the department.

2.0 The said circular has raised the following issues.

3.0 It may be noted that once credit is availed on any input, input service or capital goods, it is credited to a common cenvat credit account and the identity of the credit, with reference to its source is lost. For example, let us assume cenvat credit of Rs.1,00,000 was availed in 2016 on outward transportation services and the same has been disallowed vide an Order in Original, which has also been upheld by an Order in Appeal, passed prior to 01.07.2017. The assesse has filed an appeal against the Order in Appeal before the Hon'ble CESTAT and the same is pending. Let us further assume that as on 30.06.2017, there was a total balance of Rs.5,00,000 in the Cenvat Credit account of the assesse, it cannot be conclusively said that the disputed credit of Rs.1,00,000 is also part of this Rs.5,00,000, because, once taken in the Cenvat account, the credit merges with all other credit and its identity is lost. Hence, the presumption in the circular that the balance available on 01.07.2017 would also include the disputed credit is patently erroneous.

3.1 In this connection, it is relevant to recall that whenever any wrongly availed credit had not been utilised, there cannot be any demand of interest. While this benefit was extended by various judgements, later the same has also been inbuilt in Rule 14 of the Cenvat Credit Rules, 2004. To decide whether the wrongly availed credit was utilised or not, the only test was that if the closing balance in the Cenvat Credit account is always more than the disputed credit, it would be presumed that the wrongly availed credit was not utilised. Though the order of utilisation of credit was prescribed under sub rule (2) of Rule 14 vide Notification 6/2015 CE NT Dt. 01.03.2015, the same has been omitted vide Notification 13/2016 CE NT Dt. 01.03.2016 and hence let us not refer to the same.

3.2 Viewed in this angle, if the closing balance of cenvat credit from the month in which the disputed credit was availed till 30.06.2017 was always more than the disputed credit, it would be presumed that the disputed credit was not utilised till 30.06.2017 and hence the mischief of this circular would be attracted. But, if the balance in any month falls below, it could be argued that the disputed credit was already utilised and hence the mischief of this circular would not be attracted. For this purpose the cenvat credit account balances has to be analysed properly.

4.0 Let us see an example:

S.No.	Details	Assessee - A	Assessee – B	Assessee -C	Remarks
1	Cenvat Credit availed in April 2016, which has been denied by an Order in Original / Order in Appeal	Rs.2,50,000	Rs.2,50,000	Rs.2,50,000	
2	Closing Balance of Cenvat Credit in April 2016 (Including the opening balance and all fresh credits availed in April 2016)	Rs.5,00,000	Rs.5,00,000	Rs.5,00,000	
3	Closing Balance of Cenvat Credit in June 2017 (After considering fresh credits availed and credit utilised)	Rs.7,50,000	Rs.1,00,000	NIL	This exercise has to be done on every month basis, to find out the exact extent of utilisatin
4	Conclusions	The disputed credit has not at all been utilised, as the balance of cenvat credit is more than the disputed credit (The balance should be more than the disputed credit every month)	The disputed credit has been utilised to an extent of Rs.1,50,000	The disputed credit has been fully utilised.	

4.1 It may be observed from the above example that "A" has not at utilised the disputed credit and carried forwarded the credit balance as on

30.06.2017 into GST regime. He would be hit by the mischief of the Circular and he could not utilise such credit to an extent of Rs.2,50,000. But, since "C" had already utilised the entire credit and not carried forwarded any credit into GST regime, the circular has no application for him. B can argue that he had utilised the credit only to an extent of Rs.1,50,000.

4.2 It may be noted that the circular thus creates a serious inequity among equals. A person who had not utilised the disputed credit but carried forwarded the same into GST regime is affected and he cannot utilise the disputed credit in GST regime, whereas a person who has already utilised the disputed credit is not at all affected.

5.0 Another inequity created by this circular is that it is applicable only for the Orders passed prior to 01.07.2017, disallowing certain cenvat credit. So, if the OIO or the OIA, pertaining to the pre GST period, disallowing cenvat credit has been passed on or after 01.07.2017, this circular is not at all applicable. Let us a take a case where the order disallowing credit was passed before 01.07.2017 and another case where the order was passed after 01.07.2017. While in the first case, the assesse would be hit by this circular, whereby he could not utilise the credit carried forwarded by him to GST regime, his contemporary, in whose case the order was passed on or after 01.7.2017, would not face any such difficulty. The discrimination meted out by this circular merely on the basis of the date of passing of the impugned order, in which the assesse had no role to play, is not at all justifiable.

6.0 Further, once an appeal has been filed against the order disallowing cenvat credit, by payment of the prescribed pre deposit, recovery of the balance dues is deemed to be stayed. In this connection, reference is drawn to the following CBEC Circulars.

Circular NO. 984/8/2014 Dt. 16.09.2014.

> ***4. Recovery of the Amounts during the Pendency of Appeal :***
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> *4.1 Vide Circular No. 967/1/2013, dated 1st January, 2013, Board has issued detailed instructions with regard to recovery of the amounts due to the Government during the pendency of stay applications or appeals with the appellate authority. This Circular would not apply to cases where appeal is filed after the enactment of the amended Section 35F of the Central Excise Act, 1944 or Section 129E of the Customs Act, 1962.*
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> *4.2 No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% or 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities :*
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> *(i) proof of payment of stipulated amount as pre-deposit of 7.5%/10%, subject to a limit of Rs. 10 crores, as the case may be; and*
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> *(ii) the copy of appeal memo filed with the appellate authority.*

Circular NO. 1035/23/2016 Dt. 04.07.2016.

4.1 In light of the above judgments, the Circular No. 967/1/2013-CX, dated 1-1-2013 is hereby rescinded and following fresh instructions are given on the subject. It is also clarified that seven circulars which had been rescinded vide Circular No. 967/1/2013-CX, dated 1-1-2013 shall continue to remain rescinded.

4.2 In cases where stay application is pending before Commissioner (Appeals) or CESTAT for periods prior to 6-8-2014, no recovery shall be made during the pendency of the stay application.

4.3 For subsequent period i.e. from 6-8-2014 onwards, instructions contained in Circular No. 984/08/2014-CX, dated 16-9-2014 [214 (307) E.L.T. (T47)] shall continue to be followed. Section 129E of the Customs Act, 1962 and Section 35F of the Central Excise Act, 1944, as made applicable to Service Tax vide Section 83 of the Finance Act, 1994, was amended vide Finance Act, 2014 with effect from 6-8-2014.

6.1 Attention is also invited to the Frequently Asked Questions (FAG on GST) published by the CBEC, wherein it has been clarified as,

Q6. What is the amount of mandatory pre-deposit which should be made along with every appeal before Appellate Authority?

Ans. Full amount of tax, interest, fine, fee and penalty arising from the impugned order as is admitted by the appellant and a sum equal to 10% of remaining amount of tax in dispute arising from the order in relation to which appeal has been filed.

Q7. Can the Department apply to AA for ordering a higher amount of pre-deposit?

Ans. No

Q8. What about the recovery of the balance amount?

Ans. On making the payment of pre-deposit as above, the recovery of the balance amount shall be deemed to be stayed, in terms of section 107(7).

6.2 The rationale of the above clarification would equally apply for the pre GST demands also.

6.3 Accordingly, once an appeal has been filed against the confirmed demands and adequate pre deposit (either as ordered by the appellate authority prior to 06.08.2014 or the mandatory pre deposit after 06.08.2014) has already been paid, there is no justification for recovery of the confirmed demands towards disputed cenvat credit.

6.4 Hence, the instructions contained in the Circular No. 33/7/2018 Dt. 23.02.2018 that the disputed credits, which have been carried forwarded into GST regime could not be utilised for payment of GST is contrary to the settled legal position on recovery of confirmed demands, which are pending in appeal.

7.0 However, since it is a circular of the Board issued under Section 168, all field formations would insist for non utilisation of such disputed pre GST credits and proceed with recovery of the same, if utilised. In this connection, the following line of action is suggested.

(i) As the circular is beset with inequities, as explained above, the same shall be challenged in the jurisdictional High Court by way of a Writ Petition.

(ii) Under section 168 of the Act, instructions can be issued only for the purpose of uniformity in the implementation of the Act. It may be noted that the instructions contained in this circular are not at all with reference to implementation of any of the provisions of the CGST Act. For example, as section 15 deals with valuation, instructions can be issued on matters relating to valuation. As section 7 deals with supply, instructions can be issued on matters relating to supply. But the present instructions dealing with disputed credits under the erstwhile law, are not at all pertaining to implementation of any of the provisions of the CGST Act and hence ultra vires the Act. On this ground also, the Circular can be challenged before the jurisdictional High Court by way of a Writ Petition.

(iii) As the Circular refer only to those OIOs / OIAs **which are in operation**, the same shall not apply to those OIOs / OIAs, which are appealed against and prescribed pre deposit has been paid, since such orders are considered to be stayed / not in operation. Hence the circular is not at all applicable in such cases. The department should be replied accordingly.

(iv) Monthwise availment of the disputed credit vis-a-vis monthwise closing balance of cenvat credit, shall be compared to find out the extent of utilisation of the disputed credit and if it can be proved arithmetically, that the disputed had already been utilised, it can be argued that the circular cannot apply in such cases.

P.S. The infamous circular on recovery during pendency of appeals, bearing No. 967/1/2013 Dt. 01.01.2013 was a new year bonanza from the CBEC for advocates, as the same was challenged in almost every High Courts. The GST version of the present circular is going to be another much bigger bonanza. Long live CBEC, nay CBIC!

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Cenvat credit — Non-transition or non-utilization of Cenvat credit under Section 140 of CGST Act, 2017 — Clarification

Circular No. 33/07/2018-GST, dated 23-2-2018

F. No. 267/67/2017-CX.8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Directions under Section 168 of the CGST Act regarding non-transition of CENVAT credit under section 140 of CGST Act or non-utilization thereof in certain cases - Regarding.

In exercise of the powers conferred under section 168 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "Act"), for the purposes of uniformity in implementation of the Act, the Central Board of Excise and Customs hereby directs the following.

2. Non-utilization of Disputed Credit carried forward

2.1 Where in relation to a certain CENVAT credit pertaining to which a show cause notice was issued under rule 14 of the CENVAT Credit Rules, 2004, which has been adjudicated and where in the last adjudication order or the last order-in-appeal, as it existed on 1st July, 2017, it was held that such CENVAT credit is not admissible, then such CENVAT credit (herein and after referred to as "disputed credit"), credited to the electronic credit ledger in terms of sub-section (1), (2), (3), (4), (5), (6) or (8) of section 140 of the Act, shall not be utilized by a registered taxable person to discharge his tax liability under this Act or under the IGST Act, 2017, till the order-in-original or the last order-in-appeal, as the case may be, holding that disputed credit as inadmissible is in existence.

2.2 During the period, when the last order-in-original or the last order-in-appeal, as the case may be, holding that disputed credit as inadmissible is in operation, if the said disputed credit is utilised, it shall be recovered from the tax payer, with interest and penalty as per the provisions of the Act.

3. Non-transition of Blocked Credit

3.1 In terms of clause (i) of sub-section (1) of section 140 of the Act, a registered person shall not take in his electronic credit ledger, amount of CENVAT credit as is carried forward in the return relating to the period ending with the day immediately preceding the appointed day which is not eligible under the Act in terms of sub-section (5) of section 17 (hereinafter referred to as 'blocked credit'), such as, telecommunication towers and pipelines laid outside the factory premises.

3.2 If the said blocked credit is carried forward and credited to the electronic credit ledger in contravention of section 140 of the Act, it shall not be utilized by a registered taxable person to discharge his tax liability under this Act or under the IGST Act, 2017, and shall be recovered from the taxpayer with interest and penalty as per the provisions of the Act.

4. In all cases where the disputed credit as defined in terms of para 2.1 or blocked credit under para 3.1 is higher than Rs. ten lakhs, the taxpayers shall submit an undertaking to the jurisdictional officer of the Central Government that such credit shall not be utilized or has not been availed as transitional credit, as the case may be. In other cases of transitional credit of an amount lesser than Rs. ten lakhs, the directions as above shall apply but the need to submit the undertaking shall not apply.

5. Trade may be suitably informed and difficulty if any in implementation of the circular may be brought to the notice of the Board.