Hiregange & Associates
Chartered Accountants

May 2020 Edition

GST NEWSLETTER

Coverage

Difficulties are meant to rouse, not to discourage. The human spirit is to grow strong by conflict. Hiregange Associates coming up with latest Newsletter for the month of May'20. We wish you all a very happy reading ahead.

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MNH Corner

"One more month of uncertainty and challenge with the vaccine for the pandemic being hoped for. The government needs to take care of the economically challenged with support from all of us. It also needs to focus on reforms - tax and others to attract foreign direct investments. It should lower the interest rates to global levels for the Rs.3 Lakh crore of MSME.

We are using this opportunity to further gain in-depth knowledge and upskill ourselves internally and are supporting the sharing of knowledge through this newsletter, videos, and updated articles on our website."

VSS Corner

"Another month of lockdown keeping things standstill. A ray of hope with start of partial operation even in the red zone. Hope not fulfilled in as much as non availability of manpower, raw material, logistics leaving each one of us in speculation. The financial package announced under Atmanirbhar Bharat Abhiyan through pumps money into economy, would it guarantee business to MSME is still under question? This prompts that the business today has to be with cooperation and collaboration with MSME helping each other. Innovation comes at the time of crisis, its time for business redefinition and emphasis on fundamentals. Efforts has been made to compile the information that would be required at this hour, happy reading the newsletter."

FAQs on critical GST aspects under COVID.

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1. **What are the possible setbacks during this time of crisis to business?**

   The crisis may bring in some risk to your business, at the same time, it will also give open up some opportunity to think of innovative products and service and ways to offer the same. Few aspects that could impact the economy could be as under:

a) Reduction in consumer spending leadingthe lesser demand,
b) Spending more on basic needs rather than onluxuries.
c) Reduction in profits due to reduction in income/ turnover while cost cannot be reduced proportionately,
d) Fear of employees to do work from office (opting to work from home), quarantine norms, movement restriction affecting the productivity.
e) Negative impact on banks due stress in the defaults. Interest rates are an additional cost which MSME may not be able to absorb in these challengingtimes.
f) Inability to get working capital at reasonable costs to pay the fixed costs.

2. **What would be the major opportunity available to business entities right after the lockdown period?** There would definitely be an increasing trend within the community for domestic consumption compared to the present. Many manufacturing companies are intending to exit their business from China, which is the foremost exporter in the world. Probably this would be an opportunity for Indian entrepreneurs as India could be a preferred destination / replacement. This may need India as a country to bring certainty to our promises.

3. **Are there any relaxations available to a bonafide taxpayer, who is having serious limitations to perform any of the compliance provisions under GST Law due to the pandemic situation?**

   Safeguard could be taken with the help of a precedent depicting that if there is any impossibility for effecting any compliance procedures which has to be done under law, then it has to be considered as a procedural error by the department in order to avoid demands. However, this relaxation should not be considered as an option for purposeful non-compliance.

4. **How is extension of time limit to take composition levy considered as an opportunity for real estate in particular?**

   Tax payer's from real estate sector who are not supposed to claim ITC for their procurements could advice their vendors to choose composition levy in order to reduce their tax burden in the supply chain and if willing such option could be opted within an extended date. This is an option of tax planning available to every buyer who are restricted under law to avail ITC.

5. **What would happen if a taxpayer has erroneously paid IGST instead of CGST & SGST?**

   In terms of earlier law, the concerned person is required to pay CGST& SGST and take refund of IGST. However now there is possibility to take the advantage of interchanging the amounts under each head particularly in case of Electronic cash ledger and not in case of electronic credit ledger through FORM PMT-07.

6. **What can be done to resolve pending litigations during lockdown periods?**

   It has to be noted that, virtual hearing is suggested by departments in case of customs, central excise and GST cases. If tax payer is ready to take up the initiative for online representations then department would be considering the same which will result in speedy disposal of pending litigations. It is expected that the revenue does not continue the practice of going in appeal to higher forum in all cases without looking at the merits.

7. **What will happen for such GST amount paid on advances and later the supply was cancelled?**

   The supplier would be required to issue a refund voucher to refund the amount along with the taxes. The supplier would claim reduction from the total tax payable by him to the Government in the month of refund. If the tax payer is not having any output tax payable in that month, refund of GST paid on such advance could be claimed.

8. **What will happen to the new plan which were about to implement under FTP?**

   All existing benefits under FTP will get extended and it will take some time to frame new policy in this regard.

9. **Would GST apply on the liquidated damages received in lieu of cancellation of contracts?**

   Liquidated damages in the nature of compensation for the breach of any contract. In terms of GST

Law liability arises only if the amount received could be treated as consideration towards supply. Liquidated damages is nature of the compensation for the breach of contract and thereby the same is not a supply towards a consideration. Schedule 5(e) makes reference to tolerance of an act or a situation to be supply of service, it has to be noted that such categorization would be relevant only after said transaction is passing the test of supply.

10. **Whether agreement could be amended post supply in order to include the impact of supplementary discounts?**

Amending the agreement after supply was made would amount to frustrating an Act. However, if the taxpayer could establish that there is a deficiency in the provision of service then it could be tenable to deduct such value from the total value of supply.

11. **If sale price is less than its cost, would it have any impact under GST?**

In terms of section 15 if transaction value is the sole consideration and the parties are not related, then it could be any value irrespective of below or above cost price. Supreme Court in case of Fiat India ruled selling less than its cost with an intention to penetrate the market would be the case of price not being the sole consideration and held transaction value in such case has to be disregarded. The applicable of this decision needs to be looked at on a case to case basis and cannot be binding in all scenario. In this period it is expected that demands on sale of goods below cost may not legally be valid.

12. **What treatment to be provided in case of goods which are not returned within the prescribed time limit in case of job work?**

If the time limit is falling in between the lock down period (i.e.: Mar 20 to June 29), it need not to be treated as a supply and the concerned person would be getting additional extension period in this regard in terms of notification 35/2020-Central Tax ,dt. 03-04-2020 .

13. **What are the requirements in case of amending the agreements?**

There is no statutory requirement to intimate GST department about any amendment of the contract with the customer or vendors. However as a matter of abundant caution it is suggested to let department know about such change in form of a letter preferably sent by post or RPAD. This should be done to avoid future surprises.

14. Whether taking ITC is a right to the tax payer?

Input tax mechanism is to avoid cascading effect of the tax and once the same is accrued to a tax payer subject to fulfilment of the conditions and restrictions it would be a vested right. This is being supported by the various decision of High Court.

15. Can department deny the credit of a registered person without sufficient grounds?

Credit cannot be denied to a tax payer because it is a right vested and in terms of Article 14 and 19 of The Constitution of India, no individual shall be denied with the element of freedom of doing business. If in any case, the equality of a person is being denied by the department, he could take initiative for a representation in this regard.

Specifically, credit could not be denied because of non-matching of credit in the GSTR 2A because it will amount to the violation of article 19 as it is totally dependent upon the supplier's choice.

16. What is the validity of circulars under Law?

Larger bench of Supreme Court in case of Ratan Melting Wire Industries in 2008 (231) ELT 22 (SC) settled this issues while holding circulars which are not in line with the law don't have any legal existence. The circulars that are in line with the law would be valid.

17. Whether any relaxations in view the COVID 19 with respect to the blocked credit?

ITC eligibility on Mediclaim, food and beverages etc where credit is being blocked under GST. However this would be now allowed since there is as mandating order of MHA during current situation.

18. It is very obvious that the 180 days payment limit would be triggering in several business cases within this lock down period. What could be done in this regard?

In terms of section 16 of CGST Act 2017, if a person fails to pay the consideration within 180 days, the GST credit taken must be reversed.

However, there is a possibility of another school of thought depicting that the term "fails to pay" must be interpreted in such a way that the day must start counting from the day of failure as per contract. This could definitely be disputed. That means until unless the credit period as per the contract is not exhausted, there is no failure to pay. Agreements can be amended in this regard with the consent of both the parties.

19. What will be the implications under GST for the donations made by business entities in India with regard to Covid-19?

Donations by business corporates could be in two ways. It could be as a part of their CSR activity or as a normal donation. It is suggested that credit on CSR goods could be availed first by the registered person and reverse it under protest. Many changes have been happened in a retrospective manner and hopefully a favourable amendment in this regard is also possible. Another perspective is, if charity is there in the vision of the company the same would amounts to a business purpose and credit could not be restricted.

20. What would be the impact of GST with respect to perishable goods sold or written off ?

Because of lockdown there could be a possibility that the goods are going to perish and may have to be disposed or have to be written-off.

a) Perishable goods could be sold at a scrap value with payment of applicable GST there by is no requirement to reverse the ITC. Where the same cannot be sold, then the credit may have to be reversed.

b) In case the goods could be partially used, then such goods could be partially written of in which there would be no requirement to reverse the ITC. However in case of fully written of ITC availed needs to be reversed.

21. Is it possible to transfer balance in electronic cash ledger to another registration under same PAN?

Transfer of credit from one electronic cash ledger of a GSTIN to another GSTIN is not permissible under GST Law. Recently intra transfer from one head to other with the same GSTIN is permitted. Representation in this regard could be made.

22. How to resolve the issue of expired E-way bills where the consignment has not reached the destination?

In case of expiry of EWB, new EWB could be generated with a supporting letterhead by intimating the difficulty. As we know, 2 EWB could not be prepared for one invoice, a delivery challan could be attached to sort out this issue.

23. How to deal with contracts without a force majeure clause?

Even though force majeure clause is not there, contract act will trigger the scenario of non-performance and the contract would be open to liability. Every contract should ensure the inclusion of force majeure clause in future in order to avoid disputes.

24. Is it possible to consider the tax paid on advance under service tax regime as Tran credit?

Tax paid on advance in service tax regime could not be taken as Tran credit. The only possibility would to apply refund under the service tax.

25. Are there any provisions regarding pay under protest in terms of GST Law?

Payment under protest is the natural justice or a remedy available for the tax payer irrespective of the same being provided in the law or otherwise. This could be applied even for the GST law.

The trade/ industry needs to share its difficulty through the association and follow up regularly for tax breaks, interest breaks and stress need for urgent relook at the refroms. Today the executive is busy protecting the poor law and in restricting ITC which needs at least 1 year sabbatical.

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Employee welfare expenses-higher ITC under COVID.

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1. Background:

The entire world has been engulfed in tackling COVID-19 and so India. Declaration of COVID as pandemic by WHO has heightened the attention of the world on the serious ramification of the disease. This has also created obligations on the States to undertake necessary preventive and relief measures.

Indian has been proactively tackling this pandemic at the Centre and State level jointly. Union Government has invoked its powers under Epidemic Diseases Act, 1897 (hereinafter referred to as "EDA") and Disaster Management Act 2005 (hereinafter referred to as "DMA") and have been taking various measures timely and proactively to contain the spread of virus.

2. DMA, EDA and guidelines issued by State Government

Epidemic Disease Act (EDA) is pre independence legislation of 1897 enacted to bestow powers to the Central Government and State Government to prescribe regulations for prevention of speared of dangerous epidemic diseases.

Disaster Management Act (DMA) was enacted to tackle disasters at both Central and State Government levels. The Central Government has notified COVID as notified disaster under this Act.

Many of the States Governments have also notified the regulations under EDA. Many States including Karnataka, Maharashtra, Delhi and Kerala have issued advisories on management and brought into place 'Covid-19 Regulations, 2020' ("Regulations").

3. Order issues by MHA for COVID

Various Guidelines and orders have been issued periodically by the Ministry of Home Affairs under provisions of DMA. The orders have specific mention that States have to compulsorily follow these guidelines and they cannot give any relaxation, though may impose more stringent conditions.

One of the important order[1] issued by MHA under DMA provides for guidelines and relaxation for reopening of commercial and industrial activities w.e.f. 20.4.2020. Para 21 (ii) of Guidelines

provides that all industrial and commercial establishments, work places office etc. shall put in place arrangements (SOP) for implementing SOP in Annexure II before Starting their functioning. Some of the important measures in the SOP relevant for present discussion are as below:

2.For workers coming from outside, special transportation facility shall be arranged without any dependency on the public transportation system

5. Mediclaim insurance for the workers to be made mandatory.

In addition to the above, there are additional guidelines for the manufacturing and industrial establishments with access control in SEZ, EOU, Industrial Estate and industrial township. These establishments shall make necessary arrangements for stay of workers within their premises as far as possible and/or adjacent building. The transportation of workers to work place shall be arranged by the employers in the dedicated transport by ensuring social distancing.

Above guidelines require business to make necessary arrangements for restart of their business operations. The businesses may require incurring various nature of expenses which could be primarily below:

- Mediclaim insurance
- Transportation facility from home to work place and vice vesa
- Expenditure incurred for sanitation facility i.e. sanitizer, PPE kits, medical facility, spraying disinfects
- Stay arrangement
- Food and so on

We examine ITC eligibility on such expenses in the ensuing paragraph.

4. Input Tax Credits under GST

Section 17 (5) of the CGST Act puts restrictions on availment of ITC on many expenses especially where such expenses are incurred for the employees. However, in many of such instances, ITC is permissible where the expenses are incurred as per statutory requirement under the law. The relevant extract is reproduced below:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is **obligatory for an employer** to provide the same to **its employees** under **any law for the time being in force**.

Essential conditions to avail the ITC in such cases could be discussed as below:

- **Obligatory for the employer:** There should be obligation on the employer to provide such goods or services or both to the employees. The SOP issued by MHA provides that "following measures shall be implemented by all offices, factories and other establishments". This indicates that is obligatory for the employer to ensure that mediclaim insurance is taken for the employees.
- **Obligation is towards the employees:** ITC may be availed where such obligations are towards employees. MHA guidelines require that the mediclaim is mandatory for all the workers. The word 'worker', in the given circumstances, could be interpreted to include all employees of the establishment. Further, it could also include the casual workers or contractual works employed through any other contractor.
- **Obligatory under any law for the time being in force:** MHA guidelines have been issued under DMA Act and is mandatory to be followed by all the States. Section 72 of the Act provides that the provision of DMA shall have overriding effect over any other law for the time being in force. Hence, it could be said to be mandatory under any law for the time being in force.

  Thus, apparently all above conditions get fulfilled and hence the ITC on the same should be admissible.

  However, there are some grey areas to be considered before taking a final view.
- **Binding nature of guidelines issued**: We recollect that MHA had issued order dated 30.3.2020 wherein all employers have been asked to make full payment of wages to their workers ant their work place on the due date without any deduction for the period of lock down. The order has been challenged before Supreme Court on the ground that there is no jurisdiction with the authority to issue such orders to private establishments.
- **Guidelines dated 1.5.2020 fails to save the earlier order dated 15.4.2020:** Government has announced revised guidelines on 1st May for 3rd lockdown wherein some of the earlier guidelines have been saved. However, there is no specific reference of the guidelines based on order dated 15.4.2020 wherein insurance etc. were made mandatory.

  These could be grey areas to be resolved but in view of the paper writers, once the order has been issued by the Ministry of Home Affairs and it is mandatory for anyone to continue business activities to abide by such order failure of which could invite penal action, it could very well be said that the such services are covered in the clause "mandatory for employer under the law". ITC therefore should be eligible. Various nature of expenses and applicability of these provisions could be tabulated as below:

Nature of Expenses	ITC eligible	Eligible if mandatory by law	Whether covered MHA guidelines
Food and beverages	No	Yes	No
Hiring of motor vehicles (than 13 vehicles capacityvehi	Yes	NA (ITC is eligible i cases)	Yes
Leasing, renting or hiringof vehicles	m No	Yes	Yes, for transport of workers
Life insurance	No	Yes	No
Health Insurance	No	Yes	Yes
Guest houses etc.	No/Yes*	NA	Yes (for spec industries)
Sanitizer, PPE Kits and medical facilities	No/Yes*	NA	Yes

* ITC is eligible if incurred in the course or furtherance of business. However, ITC not admissible if used for personal consumption.

5. FAQs on various employee related expenses

Based on above background, we discuss ITC eligibility on above expenses in the question and answer format.

1. **We are having manufacturing facilities. Can we take input tax credit of GST paid on employee Mediclaim insurance?**

   Health insurance is covered under the blocked credit unless such insurance is obligatory for an employer to provide the same to its employee under any law for the time being in force. Guidelines issued by MHA under DMA requiring mandatory Mediclaim insurance for the workers could be said to be mandatory requirement under the law and hence the ITC of the same should be eligible.

2. **The guidelines provide for Mediclaim insurance for the "worker". Whether employees could be said to be covered within the definition of workers?**

The guideline as well as the Act does not provide the definition of workers. However, considering the context of guidelines, it would not be appropriate to confine the meaning of workers only to the employees working in factory etc. Further, the approval required to be obtained for the reopening of businesses require Mediclaim insurance for all the employees. Hence, the benefits of ITC should be admissible in respect of all the employees including for contractual workers if the cost is borne by the Company.

3. **Whether any differences based on nature establishments i.e. offices, factories or any other establishment for the purpose of availing the input tax credits?**

   The preamble to standard operating procedure issued by MHA guidelines covers all offices, factories and other establishment. Hence, in view of the compulsory requirement to obtain the insurance for all such establishment, ITC of the same should be eligible to all such establishments.

4. **Mediclaim insurance policy was obtained prior to issuance of guidelines. Whether ITC would be available on such insurance policies also? (i.e. policy taken on 1.1.2020 for 12 months expiring on 31.12.2020)**

   Conditions of availment of ITC have to be satisfied on the date of receipt of services. Where the insurance ITC was not admissible on the date of receipt of insurance policy, ITC of the same may not be claimed now (fully or proportionately).

   There is another view also that the eligibility or otherwise of ITC u/s 17 (5) need not be seen only on the date of receipt of supply of goods or services. This is also supported from the clarification issued by Government w.r.t. section 17 (5) (h) where it has been held that ITC is not available in respect of the goods lost, stolen, destroyed, written off etc. even in case of manufacturer also (where it may not be known as to occurrence of such event at the time of procurement). Hence, any post facto change in the treatment of goods or services could make the ITC eligible or ineligible.

   In present case, the employer having Mediclaim facilities in force before order of MHA need not take new policy. This could lead to a possible view that the order of MHA is complied with in such cases also and the ITC of the same should be eligible. However, this has to be judicially tested.

5. **Existing policy did not cover COVID. Additional policy has been taken or additional premium has been paid for coverage of COVID in existing policy. Whether ITC would be admissible on**

such top up/additional policy?

Considering that the additional policy or top up has been taken in order to fulfil the requirements of the MHA guidelines, it could be said to be obligatory for the employer and hence the ITC of the same should be eligible.

6. **Policy has been taken by the company but in the individual name of the employees. Whether ITC would be admissible?**

   Where the policy has been taken in the name of individual employee, not in the name of entity, ITC may not be admissible to the entity.

7. **Part of premium has been recovered from the employees? Whether ITC of the same would be admissible?**

   It has been held by AAR in case of Posco that the recovery of insurance premium from employee does not become a supply as the company is not permitted to provide the insurance services. It could be said that to the extent of recovery of premium from the employees, the services are not availed by the company and hence ITC of the same may be questioned. Recovery of premium from employee could also tantamount that the expenditure is incurred for the personal consumption of the employee to the extent of such recovery and hence ITC of the same may not be admissible.

8. **Insurance policy also covers the dependent of the employees. Whether ITC of the GST paid on entire premium could be claimed?**

   There is no requirement under the guidelines to extend the insurance coverage to the family members of the employees. In the absence of the same, ITC may not be admissible to the extent of premium pertaining to the family members. In order to avoid the dispute, it is suggested to indicate the premium pertaining to the family members separately in the insurance policy, claim document, invoice etc.

The insurance policy normally covers the entire period of one year. Whether ITC may be claimed for the premium paid for full year or it would be eligible only to the extent of period of lockdown? Obtaining Mediclaim insurance is mandatory for the employer situations. If the guidelines are withdrawn in future, ITC may not be admissible for the policies taken after withdrawal of such guidelines unless taking insurance is made mandatory under any other law or

regulations for the time being in force at that point of time.

9. **Many employees have been working from home. Whether ITC may be claimed in respect of such employees also?**

   Attending offices upto certain limit is only permissible under the guidelines. All other employees have to work from home. Further, the policy has to be taken for all the employees. Hence, there is no restriction in claiming ITC in respect of the workers working from home.

10. **Life insurance policy has been taken for the employee. Whether ITC on the same would be admissible?**

    No conditions have been imposed in the MHA guidelines for life insurance. Hence, the ITC of the same may not be admissible.

11. **Whether ITC may be claimed on the vehicles deployed for transportation of employees?**

    Hiring, leasing or renting of motor vehicle is not eligible ITC unless mandated under any law for the time being in force. MHA guidelines require that special transportation facility shall be arranged without any dependency on the public transportation system for workers coming from outside. There is no defined meaning of 'outside'. It could be construed as provision of transportation facility for workers not staying in the factory or place of business. Hence, in our view, all employees would get covered where transportation facility is provided for their commutation. ITC in such cases may be summairsed as below:

12. irrespective of the time limit. Hence, ITC should be admissible for the full premium paid. There is no reason to restrict it to the period of lock down.

13. **Whether all future Mediclaim insurance would be eligible for ITC?**

    It depends upon the period of operation of MHA guidelines. These guidelines have been issued under power vested in Union Government under DMA Act which is invoked in exceptional

Transportation through MV having more 13 seating capacity	Eligible irrespective of MHA guidelines
Transportation through other motor ve (renting, hiring or leasing of MV) – pa under	h Eligible under MHA guidelines

RCM or FCM	

Note: many of the State Government requires taking e-pass for reopening of the business wherein the details of vehicles are required to be given. It is suggested to provide details of such vehicles in application for reopening of office to establish that such transportation in in conformity of MHA guidelines.

14. **Employee transportation is done through Ola/Uber etc. Whether ITC of the same would be eligible?** These mediums could get covered within the meaning of public transportation facilities and hence may not be admissible for ITC.

15. **It has been normal business practice of the company to provide for the transportation facility to the employees where ITC has not been taken in the past. Whether there would be change in the answer in case of such companies?**

    Transportation facility provided by the company in past could be said to be as per needs or policyof the business and was not in accordance with any statutory requirement for the time being in force. Hence, ITC on the same was not admissible. However, once it has become statutory requirement for the business to provide such facilities, ITC on the same could be claimed even if the same facilities were provided in the past without ITC.

16. **Whether ITC may be claimed for the expenses incurred on PPE kits, sanitizer etc which are made available for use of the employees?**

    ITC on such items is eligible as these expenses are incurred in the course or furtherance of business and may not be said to be for personal consumption of the employees. Further, some of such expenses are considered eligible expenses for CSR purpose. Considering that CSR is one of the legal requirement of the business, ITC of the same should be admissible. However, sometimes, businesses take a call not to take ITC on CSR attributable expenses as they have to incur contribute certain percentage towards CSR. To the extent of ITC availed, the companies may require to make additional contribution in order to fulfil CSR limit.

17. **Guest house or hotel facilities have been arranged for the employees near the factory. Whether ITC may be claimed on such expenses?**

Hotels or guest house facility, **in the normal course**, may be construed as expenditure incurred in the course or furtherance of business. There have been judgments under service Tax law[2] holding that guest house facility is in the nature of personal nature of expenses and not eligible for cenvat credit. There is condition u/s 17 (5) where ITC may not be claimed for the expenses incurred for personal consumption.

MHA guidelines require maintenance of accommodation facility in case of SEZ, EOU, Industrial Estate and industrial township. Such expenses may not be said to be in the nature of personal expenses and hence ITC on the same should be eligible for such establishment.

Even for other establishments, ITC on such expenses should be admissible as provision of such facility under present circumstances may not be said to be in for personal consumption or personal purpose.

18. **Food or canteen facilities provided to the employees. Whether ITC on the same may be claimed?**

Food and beverages are covered within blocked credit unless it is provided in accordance with any law for the time being in force. Canteen run in accordance with the Factories Act could be said to be covered within the statutory requirement and ITC of the same was admissible even in the earlier period. Such entities would continue to be eligible for ITC in the COVID period also.

With respect to other entities not covered within the definition of factory or not required to have such facilities for the employees, we have not come across any guidelines under MHA order to compulsorily provide such facilities. In the absence of the same, ITC on the still continues to be covered under blocked credit.

Conclusion:

In this period of economic difficulties, it is imperative for each business to evaluate possible measures to reduce the cost. One should closely look at all expenditure where input tax credit has not been taken in the past to evaluate if there exist possibilities of availing due to change in the law or judicial developments.

There could be possibility of revenue taking conservative view on many of such credits. It is suggested to intimate the stand taken along with basis thereof to the jurisdictional office to establish the bonafide.

(Note: FAQ in this document is not designed or released by Board. These have been framed by authors considering various practical scenarios arising in the business. The compilation is merely

for knowledge dissemination and must be independently examined before taking any final view. Author shall not be responsible for any decision taken based on this article.)

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GST refunds a need for pandemic situation- issues and solutions.

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In this pandemic situation across the globe, the department is active in processing the refund applications to help the export community especially the MSME sector to combat the present situation. The next 3-6 months may be the golden period to get refunds expedited. However, at the ground level there are many issues which crop up while uploading the documents and also few clarifications which are restrictive compared to the GST law. In the articles let us discuss the issues and possible solutions. Many solution lie with the Government which needs to acted upon and rectify the anomalies to fasten the process of refunds claims.

Circular and rules traversing beyond the GST law

Circulars are issued to provide the instruction and directions by the authority that aims clarify the ambiguity and Rules are considered as delegated legislature to provide the procedures to comply with the authority provided in parent law. Following are the settled principles of law relating to Circulars issued by the authority which can be noted:

1. Beneficiary Circulars are binding to the department and Circular contrary to the statutory provisions has really no existence in law same has been held in **Commissioner v. Ratan Melting and Wire Industries 2008 (12)T.R. 416 (S.C.).**
2. Circular cannot impose limitations/conditions which are not provided in the statute and further it cannot take away the rights conferred by statute. Reliance is placed on **Tata Teleservices Ltd. v. Commissioner 2006 (194) L.T. 11 (S.C.).**

   If the subordinate or delegated legislation exercises its power in excess of as conferred by the enabling or Parent Act or is in conflict with the provisions of the Enabling or Parent Act it would be ultra vires.

Let us now understand some of the issues under refund where the authority has gone beyond the delegated powers to provide the restriction to claim the refund.

1. **Restricting input tax credit to GSTR 2A:**

The availment of credit restricted w.e.f. 09th October 2019 to the extent of invoices reflecting in GSTR-2A with an additional scope of 10%/20%. Such restriction has been provided from the delegated authority and not from the principal law which could be invalid.

Further, prior to introduction of Rule 36(4), the refund of input tax credit was allowed on credit reflecting in GSTR-2A and if not reflecting, then upon the submission /uploading hard copy of invoices. The impugned circular no 135/05/2020 dated 31.03.2020 clarified that the refund has to be restricted to the extent of invoices reflecting in GSTR-2A and does not provide for the refund of additional 10%/20% as provided in the Rule 36(4). **CBIC/ Govt. need to correct the anomaly.**

2. **Clarification with regard to inverted duty structure**

Circular provides the inverted duty structure refund would not be eligible in the scenario where the inversion is due to change in the GST rate on the same goods. Section 54(3)(ii) of CGST Act, 2017 provides that 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) may claim refund of unutilised input tax credit. Such denial of refund of inverted duty structure on account of change in GST rate on the same goods provided in the Circular has not been restricted in the Act. Accordingly such restriction cannot hold good. **CBIC/ Govt. need to correct the anomaly.**

3. **Putting cap on valuation for restricting the refunds**

In case of refund of ITC in case of zero-rated supply of goods made without payment of tax under bond or LUT, the Government has capped the maximum value of turnover of zero-rated supply of goods up to 1.5 times the value of like goods domestically supplied by the supplier or similarly placed supplier as stated in Rule 89(4)(c). This amendment is inconsistent with the Section 15 of CGST Act 2017 which lays down the provision for valuation.

Now, this rule is very restrictive and causing hardship to genuine exporter of goods. Exporter engaged in customized client specific products, may face challenges in identifying a domestic supplier and finding a comparable value in order to ascertain the value of goods only for the purpose of refund calculation. These kinds of restriction would also make our Indian products internationally incompetent, which basically defeats the primary purpose for providing various benefits for exports. Author is of the view limiting the value of export turnover only for the purpose of refund calculation is arbitrary, when there is a specific rule emphasizing on realization of export proceeds for goods. **CBIC/ Govt. need to correct the anomaly.**

4. **Recovery provisions for non-realization ofexport proceeds**

   Rule 96B of CGST Rules 2017 has been introduced w.e.f. 23.03.2020 to provide for recovery of refund of unutilised ITC or IGST in case non-realization of proceeds for export of goods. Definition of export of goods under Section 2(5) of IGST Act does not provide for realisation of proceeds unlike export of services. Now, inserting this kind of provisions in the rules, where parent act doesn`t provide so would create difficulty and enhances the litigation. Especially in case of export of goods, where the definition under both Indian customs act and GST merely stress upon taking goods outside India and doesn`t emphasis on realization of the proceeds. Hence, this rule could be quashed. **CBIC/ Govt. need to correct the anomaly.**

1. **Restriction of refund of IGST paid on export of goods to specified person under Rule 96 (10)**

   According to Rule 96(10) as introduced originally, the "exporter" was allowed to export goods on payment of IGST only if the said exporter has not received goods from a "supplier" who had availed the benefit of any of the notifications specified in the said rule. However, after multiple amendments, the rule now provides that an exporter who is availing the benefit of the notifications specified in (b) or receives supplies from a person who is availing the benefits under clause (a) of Rule 96(10) will not be entitled to claim refund of IGST paid on export of goods w.e.f 9-10-2018. However, there is still an ambiguity on the periodicity & extent of restriction i.e. till what period the restriction is going to be applied.

   For example, If the exporter received supplies either under notification 48/2017-CT or 40/2017-CT, at any time during the year, will such exporter be barred for the life time from claiming refund under exports on payment of IGST or be restricted from claiming refund on exports on payment of IGST during the financial year in which supplies were received under the prescribed notifications. Author is of the view that supplier upon exhausting the stock of supplies received under notification 48/2017-CT or 40/2017-CT, would be entitled for claiming the benefit of exporting on payment of IGST. **A clarification in this regard will be helpful to the industry.**

2. **New Requirement to mention HSN/SAC in Annexure 'B'**

   The circular instructed the taxpayer to provide the HSN/SAC and also the category of input tax credit (Inputs/Input Services/Capital Goods) which helps the officers to identify the eligible credit for refund. Though the modification seems reasonable, the question arises whether a circular can modify or amend the forms / annexure to the forms which are notified by the Government. **CBIC/ Govt. need to correct the anomaly and clarify that these requirements would not apply for refunds filed upto December 2020.**

GSTIN system related issues

1. **GSTIN website not working:** While uploading of the requisite documents, the website shows errors which keep occurring and thereby submission of application would get delayed by 3 to 4 days. **Solution:** After trying multiple times, it will accept and submission is possible. In case still the documents are not been uploaded then raise the grievance through GST portal.
2. **Documents have to be compressed:** Taxpayers are expected to upload the supporting documents while filing their refund application (Form GST RFD-01). The GST Common Portal allows taxpayers to upload 4 documents up to 5 MB each (total 20 MB). While submitting, tax payers are required to keep all the scanned documents within the maximum size of file allowed on the portal so the assessee are expected to go through lot of trimming and compressing procedure.

   Solution: Till the department expands the capacity of the server and strength of the same, the taxpayer is expected to upload only the requisite documents.

Unable to view the documents uploaded by taxpayers: Its quite surprising to notice that, few times deficiency memos were issued instructing to submit the documents which are already uploaded along with refund application. It was noticed that, the list of documents which are uploaded on the website which was acknowledged to taxpayers also but such documents were not been viewed by the officers. Such a case is a pitiful situation.

Solution: The taxpayers are advised to upload the documents again after issuing deficiency memo or could even send an e-mail to concerned officer attaching all the documents. If required, taxpayers are advised to keep nodal officers into loop which helps to escalate it further, if required. The Government in this case should focus to resolve the system related issues and fix the same.

Other Issues

1. FIRC/BRC expected by the department to furnish where banks have stopped issuing such documents and has been issuing Bank Credit Advise. In such case, department has been denying refund as documents are not been furnished. **CBIC/ Govt. need to correct the anomaly clarifying to accept evidence.**
2. Circular 135/05/2020 – GST has been issued on 31st March 2020 providing the additional requirements to be submitted for claiming the refund such as Annexure B for HSN wise details

and restricting the refund for input invoices available in GSTR 2A. Department has started issuing the deficiency memo for the refund applications filed before the circulars was issued causing the hardship to the genuine claimant. **CBIC/ Govt. need to correct the anomaly and give instruction to stop these type of denial/ delaying of refunds.**:

Conclusion

In such pandemic situation where the Government has been aiming to provide the refunds to the genuine tax payers, Such issues have delayed the processing of refund claim affecting the working capital of the taxpayers. It is settled position in law that procedural lapse cannot deny the substantial benefit, denial on the above stated points can be challenged. It is also suggested to tax payers to request to the department to exercise the power under Section 54(6) of CGST Act 2017 to provide the refund up to 90% of refund claim on provisional basis which could be beneficial to the genuine exporter during this pandemic situation.

Thanks for the assistance CA Dhruv Dedhia.

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ITC on canteen service is not restricted under section 17(5)

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It is a general understanding that input tax credit on canteen service is a blocked credit under section 17(5) of the CGST Act, 2017. The canteen service is being misconstrued to be outdoor catering service. There is a difference between supply of Food & Beverages, Restaurant service and Outdoor catering. In all these three supplies, food & beverage is involved. Only the dominant nature and the place where food & beverage is supplied makes the difference.

Supply of food – Goods or Service?

As we know, food and beverages per se, are goods. However, if the food and beverages are supplied at certain places, the same becomes service. The term food and beverages have not been defined in GST law.

Schedule II classifies supply of food or drinks as service in certain cases where supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (other than alcoholic liquor for human consumption), where such supply or service is for cash, deferred payment or other valuable consideration. In other words, if food or drinks are supplied as a part of service for consideration, the activity amounts to service.

It is important to note that if the food or drinks are supplied as a part of service without consideration, then the same shall not amount to service.

What is Restaurant Service?

The rate notification No. 11/2017-CGST(R), as amended by Notification No. 20/2019-CGST(R), wef 01.10.2019 has defined restaurant service and outdoor catering as under; "(xxxii) 'Restaurant service' means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied."

"xxxiii) 'Outdoor catering' means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, at Exhibition Halls, Events,

Conferences, Marriage Halls and other outdoor or indoor functions that are event based and occasional in nature."

The GST rate for food (CH 2106), beverages (CH 2202) are provided in Notification No. 1/2017-CGST (R) and most of the food preparation and beverages attracts 18% GST. GST rate for restaurant service and catering service is provided in Notification No. 11/2017-CGST (R) and the rate specified is 5% subject to the condition that ITC shall not be availed.

Restriction of ITC is on Food & Beverages and Outdoor catering, not on Restaurant service.

Section 17(5) provides certain restrictions for availing ITC on food, beverages and outdoor catering. It's a non-obstante clause thereby overrides the provisions of section 16(1) and 18(1). Section 17(5) provides that input tax credit shall not be available in respect of interalia, food and beverages, outdoor catering etc.

The said provision also specifies that ITC on food and beverage is available if the outward taxable supply is also in the same category or the same are used as an element in the taxable outward supply being composite supply or mixed supply.

It is important to understand the meaning of the term 'in respect of'. The Hon. Supreme Court in the case of State of Madras vs M/S. Swastik Tobacco Factory 1966 AIR 1000 (S.C.) held that Indian tax laws use the expression "in respect of" as synonymous with the expression "on". The expression "in respect of the goods" in r. 5(1)(i) of the Rules means only "on the goods". Even if the word "attributable" is substituted for the words "in respect of", the result will not be different, for the duty paid shall be attributable to the goods. If it was paid on the raw material it can be attributable only to the raw material and not to the goods.

From the above, the restriction of ITC under section 17(5) is on supply of food & beverages and outdoor catering only and not on restaurant service. It may be incorrect to expand the meaning of food and beverages to restaurant service for the purpose of this provision. The proviso to this section allows ITC where food and beverage is part of other taxable outward supply. For example, if food and beverage is part of accommodation service, credit on the same is allowed. The law does not require to segregate the element of food and beverage from any outward supply and disallow the credit on food and beverage.

Canteen facility by employer is not a service

In the case of Bhimas Hotels Pvt Ltd V. UOI, WP 217 of 2017, Hon. Andhra High Court held that once the activity undertaken by the petitioner in the form of supply of food to its workers at a subsidized rate is understood to be part of their industrial obligation, it is unthinkable that the same can be construed as service falling within the definition of the expression service under Section 65B(44) of the Finance Act.

It is also stated in the above case that section 2(rr) of the Industrial Disputes Act, 1947 "wages" means all remuneration capable of being expressed in terms of money, which would, if the terms of employment, expressed or implied, were fulfilled, be payable to a workman in respect of his employment, or of work done in such employment, and includes- (i) such allowances (including dearness allowance) as the workman is for the time being entitled to; (ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles; (iii) any travelling concession; (iv) any commission payable on the promotion of sales or business or both.

The AAR decisions which have held on the basis of provisions prior to 01.10.2019 that providing food and beverage is outdoor catering service, is liable for payment of GST, covered under restriction under section 17(5) etc are irrelevant after the amendment.
Thus, we may say that the canteen service provided by the employer to employee is a condition to the employment and therefore, it is not amount to providing taxable outward supply.

Important point to be noted here is that the supply of food & beverages to qualify as service, the food & beverages must be supplied for any valuable consideration. If the food & beverages are supplied without any valuable consideration then the supply shall not be a service irrespective of the dominant intention or the place where it is being served.

Canteen Service is not used for personal consumption.

Prior to 01.04.2011 the phrase 'activities relating business' was included in the definition of input service under the provisions of Cenvat Credit Rules. Various courts have held that canteen service is an activity relating to business and therefore, cenvat credit on the same is eligible.

Further, if the legislative intention was to disallow credit on all supplies consumed by employees,

separate sub-clause (b) which includes food and beverages, outdoor catering etc which are also meant for consumption of employee would not have been there. It is a settled legal principle that one provision cannot be interpreted to make other provisionredundant.

Definition of business in GST Act includes any activity or transactions in connection with or incidental or ancillary to any trade, commerce, manufacture, profession etc.

Thus, any welfare activities or facilities to employees including canteen service is not meant for personal consumption of the employee. Only where the personal obligation of the employee is met with by the employer, the same amounts to personal consumption of the employees.

Conclusion:

In view of the above, discussion, we may conclude that canteen service is not included in section 17(5). There is no restriction for availing ITC on the restaurant service or canteen service.

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Top 5 GST issues in real estate sector

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1. **12% GST with ITC for all new projects post 1st April 2019:** The GST rate of 5% without ITC is said to be mandatory. However, a view can be taken that 5% rate is conditional thereby Taxpayers has an option to pay GST @12/18% with full ITC. Most of the times, paying GST @12% with full ITC could be beneficial instead of composition rate of 5% without ITC for competitive/ reasonable cost housing for middle class.

2. **GST liability on JDA arrangements:** The Government is attempting to levy GST on the Built-up area given to the landowners by virtue JDA's and w.e.f. 01.04.2019, the Builder made liable for GST under RCM on the Development Rights received from Landowners. The land & building being out of GST, it can be said that GST is not liable on the JDA arrangements. Even it is liable, the taxable value must be restricted to SRO value of the land or at least construction + 10%. Paying GST on 67% where not viable, this option could be important.

3. **Actual land value shall be given as deduction instead of notional 1/3rd value:** GST law provides for standard deduction of 1/3rd sale price towards 'land' and assuming balance 2/3rd portion towards 'materials & labour'. However, a vie can be taken that actual value of land shall be deducted instead of deemed deduction of 1/3rd value thereby bringing down the GST liability substantially in most of the times.

4. **GST liability on the construction work done till customer comes in:**
   The construction activity becomes works contract only from the date on which the agreement of sell (AOS) is entered. Till then, it can be said that it is self-service and GST is payable only on the portion of construction activity done after entering AOS. Suppose at the time of AOS, the 80% of the construction is over, then GST is to be paid only on 20% of sale value and balance 80% would be out of GST.

5. ITC of construction expenses for property leasing business:

GST law allows input tax credit if the constructed commercial premise is meant for sale. However, if the constructed commercial premise is meant of letting out or used as office/factory/godown, ITC is not available as per the present GST provisions. In both the cases, it is supply, in the former case GST is allowed and later case it is not. It can be said that this kind of rrestriction is arbitrarily, against the principles of Constitution & GST.

Please note that aforesaid options may require judicial test by the Courts which could take considerable time to settle. Many of these issues are already before in the High Courts and decisions in this regard would support or negate the planning being done.

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GST-retrospective amendment-transitional credit claims of past-disentitled now?

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Introduction:

GST laws contain Transitional provisions inter alia Section 140 of CGST Act, 2017 (similar provision in State GST laws) enables the taxpayer to carry forward the unutilized input credit under the pre- GST regime and allow the credit of taxes paid on the stock as on 30.06.2017 as GST credit. For this, Rule 117 of CGST rules, 2017 as amended inter alia requires the taxpayers to file Form GST TRAN- 1 electronically.

This was to ensure a smooth transition from old laws (Central Excise, service tax, VAT) into GST, avoid the double taxation by way of cascading of taxes. The philosophy was that since the GST rate was calculated to consider the new tax rate and the tax credits under the earlier regime which needed also to be transited.

The plain reading of the provisions makes it clear that the provisions are designed with the stated objective of avoiding double taxation and ensuring the smooth transition. However, practically the aforesaid purpose & objective was not achieved specifically the filing of Form GST Tran-01. Various petitions had/are been/ being filed across the country and the Hon'ble High Courts have time & again directed the Government either to reopen the portal or to allow the manual filing of the forms. Some courts have suggested the Government to set up a redressal committee.

Setting up IT Redressal Committee:

In light of these developments and acknowledging the genuine problems faced by the Taxpayers, the Government had provided a window enabling the taxpayers to file the Form Tran-1 till 31.03.2019 and which was now extended till 31.03.2020. This facility is available only to the persons who have digital evidence to prove the technical glitches while filing their Form GST Tran-1 online. However, the Government has not given the opportunity to the taxpayers who could not file form Tran-01 for various other reasons such as:

- Attempted filing online but did not take the digital evidence like screenshots, help desk correspondence, etc as they/ their consultants were not tax savvy and the awareness of the massive implication on a procedure not followed was not known.

- Lack of awareness about the due date [which changed frequently]
- Mandatory e-filing system being new or Lack of computer system in place.
- Mistakes committed while filing online.
- Ignorance with the hope that due date would be extended (which is very frequent in GST) etc.,
- Missed for other reason-someone else should do

All these categories of the taxpayers who lost out ITC do not have any option but to approach the High courts.

HC decisions:

In recent times, the series of decisions are delivered by the various High courts most of the times, allowed the taxpayers to claim the Transitional Credit. The noted decisions are as follows:

a. Brand Equity Treaties Ltd v. UOI 2020-TIOL-900-HC-DEL-GST
b. Adfert Technologies Pvt Ltd v. UOI 2019-TIOL-2519-HC-P&H-GST
c. Siddharth Enterprises Vs The Nodal Officer 2019-TIOL-2068-HC-AHM-GST
d. Tara Exports v. Union of India – 2019 (20) G.S.T.L. 321 (Mad.) e.Uninav Developers Pvt. Ltd. v. UOI 2019-TIOL-1661-HC-DEL-GST And a host of many other. The summary of the decisions is given below:

- The Introduction of Rule 117(1A) & Rule 120A and absence of any time period prescribed under Section 140 of the CGST Act, 2017 indicates that there is no intention of the Government to deny carry forward of unutilized credit of duty/tax already paid on the ground of time limit.
- The right to carry forward credit is a right or privilege, acquired and accrued under the repealed Central Excise Act, 1944 (1 of 1944) and it has been saved under Section 174(2)(c) of the CGST Act, 2017 and, therefore, it cannot be allowed to lapse under Rule 117 of the CGST, 2017, for failure to file declaration form GST Tran-1 within the due date
- The pre-GST ITC which stood accrued and vested is the property of the assessee and is a constitutional right under Article 300A of the Constitution. The same cannot be taken away merely by way of a delegated legislation by framing rules without there being any overarching provision in the CGST Act, 2017
- The time limit prescribed under Rule 117 to allow the availment of the ITC with respect to the purchase of goods and services made in the pre-GST regime and post-GST regime is arbitrary, irrational and unreasonable and, therefore, it is violative of Article 14 of the Constitution;
- By not allowing the right to carry forward the CENVAT credit for not being able to file the form GST TRAN-1 within the due date may severely dent the writ-applicants working capital and

may diminish their ability to continue with the business and such action violates the mandate of Article 19(1)(g) of the Constitution;

- The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and is, therefore, arbitrary and irrational;
- The phrase "technical difficulties on the common portal" should be given a liberal interpretation because it is a settled principle of law that an interpretation unduly restricting the scope of a beneficial provision should be avoided so that it may not take away with one hand what the policy gives with the other;
- The due date contemplated under Rule 117 of the CGST Rules to claim the transitional credit is procedural and thus merely directory and not a mandatory provision;
- The GST System is still in a 'trial and error phase' as far as its implementation is concerned and the Government cannot adopt different yardsticks while evaluating the conduct of the taxpayers, and its own conduct, acts and omissions.
- GST is an electronic-based tax regime and most of the people of India are not well conversant with electronic mechanisms.
- Technical glitches on the common portal have to be read widely and not limited to facing tech filings online. It would be an erroneous approach to attach undue importance to the concept of "technical glitch" only to that which occurs on the GST Common portal, as a pre-condition, for an assessee/taxpayer to be granted the benefit of Sub- Rule (1A) of Rule 117.
- There were many steps and columns in TRAN-1 forms thus the possibility of mistake cannot be ruled out.

  It is important to note here that there are contrary decisions from some HC's.

Retrospective amendment vide Finance Act, 2020:

Section 128 of Finance Act, 2020 amends section 140, ibid to insert the words 'within such time' (w.e.f 01.07.2017). Notification No. 43/2020- Central Tax dated 16.05.2020 was issued notifying the effect of aforesaid retrospective amendment though it was not warranted in terms of Section 2 of Finance Act, 2020. The consequence of the amendment is that the Government has the power to prescribe the time limit for claiming Transitional Credit through the rules. Earlier such delegation to prescribe rules was missing in the Parent Statute (CGST Act, 2017).

Retrospective amendment – valid?

When indirect tax reforms were undertaken about 5 years back FM made an announcement that no retrospective amendments would be made which impacted the tax payer. Unfortunately this EXCELLENT PRACTICE has not been followed and the PROMISE BY GOVERNMENT not kept up. We are gone back and followed very poor practices which increases the uncertainty of the law and unfair method of rectifying all the errors of drafting and just rights of the tax payer, objective of avoiding cascading thrown to the winds.

No doubt, the Government has the power to make the retrospective amendment though it is unfair and creates uncertainty. Sufficient to mention the retrospective amendments can be struck down if such amendment creating any unreasonable restrictions which violate the right to carry on business or the right to hold & dispose of the property. The instant case of retrospective amendment shall pass through this judicial test.

Further, the Hon'ble SC in Eicher Motors Ltd v. UOI 1999 (106) E.L.T. 3 (S.C.); Jayam & CO. vs. Asst. Commr 2018 (19) G. S. T. L. 3 (SC) held that accrued ITC is vested right and cannot betaken by the Retrospective amendment. These decisions have been followed in the various HC decisions (cited supra) rendered in the context of Transitional Credit under GST.

Whether Retrospective amendment overcomes the above HC decisions?

Further, it is interesting to find out whether the present retrospective amendment annuls the rationale of the above cited decisions and restrict the transitional ITC particularly for the taxpayers who do not have the evidence to show the technical glitches on the common portal. In this regard, as seen from the rationale of the above cited HC decisions (summarised supra), the Hon'ble HC decisions are not merely based on legal infirmity that Rule 117, ibid lacks the power to prescribe time limit but various meritorious reasons. Thus, the Retrospective amendment would not overcome the above rationale of HC decisions and it attempts to cure the defect in the delegation alone. **Therefore, in the view of the paper writers the taxpayers still have a chance to claim the Transitional Credit and rely on the above cited decisions.**

Be that as it may, it is settled law that retrospective amendment specifying the new law of limitation cannot suddenly extinguish the vested right of action by providing for a shorter period of limitation. Similarly, the retrospective operation should not be given to a statute to take away or impair an existing right. Based on this legal principle, the claims filed before 18.05.2020 (notifying the retrospective amendment) would not get impacted by such retrospective amendment and stands in a better position compared to the claims made after 18.05.2020.

Conclusion:

In the author's view, the retrospective amendment merely validates the timelines prescribed u/r. 117 which was missing previously. It would be incorrect to give the effect of retrospective amendment beyond this point and is insufficient to nullify the rationale of the above cited HC decisions, which would still hold the field. Therefore, the taxpayers who have missed claiming transitional credits even now can claim the same. The suggested course of action is as under:

- Apply to the Nodal officer for enabling the filing of Form GST Tran-1 online, preferably on or before 30.06.2020
- If the application is rejected or not acted in a reasonable time, file a writ petition before the Jurisdictional HC for necessary directions.

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Classification of alcohol based sanitizer.

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Issues in classification – Pharma Products

1. Chapter 30 of the Customs Tariff Act covers classification of pharmaceutical products. The most essential characteristic of any medicine is its curative effect i.e. **therapeutic use**. Curative effect means its ability to cure the disease or mitigate the disease. Another important characteristic is medicines should have the ability to prevent any disease i.e, **prophylactic use**. The therapeutic or the prophylactic values are the basic factors to be considered in classification of a product as medicines.

2. However, it must be noted that mere having some therapeutic or prophylactic properties alone cannot make any product as medicines. The product must be used mainly to cure or prevent diseases and contains curative/preventive ingredients even in small quantities to classify as medicines.

3. For instance, there have been many disputes as to whether a product is a cosmetic product or medicines. Certain cosmetics may also have some curative or preventive effect. However, the primary intention of using cosmetics is to enhance the appearance. Ancillary property of curing or preventing the disease shall not make cosmetic as medicines.

4. Similar classification dispute existed as to whether a product is food supplement or medicine. The food supplements are also known as health tonics or nutraceuticals. Food supplements generally contains vitamins or proteins. It may have some element of therapeutic or prophylactic values. However, the primary intention is the general well-being and not to treat any disease.

Hand Sanitizer – Classification

5. From the common parlance, hand sanitizer is used for handwash. Technically the same may be disinfectant (CH 3808), skin washing liquid (CH 3401), cleaning preparation (CH 3402) or medicine (CH 3003). The ingredient shall differ, manufacturing process shall differ, but the end use is to clean the hand. The classification in such cases shall be made based on its ingredients and

application.

6. There are a number of judicial precedents which have held that a product would be classified as medicament under Chapter 30 since its ingredients were found to be in Ayurvedic texts, for cure or prevention of a particular disease. Hence one of the essential tests of classification of this product would be based on the ingredients and its end use (reference to common parlance)

7. **Currently**, we understand that there are two tariff entries which are under deliberation. They are

HSN 3003

Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale

HSN 3402

Organic surface-active agents (other than soap); surface-active preparations, washing preparations (including auxiliary washing preparations) and cleaning preparations, whether or not containing soap, other than those of heading 3401

8. Before evaluating the appropriate classification, one may also have to evaluate the classification adopted for the said goods, prior to the COVID-19 pandemic. Earlier, a general hand sanitizer was used as a product to clean the hands and was merely used as an alternative to soap (liquid form or in bar form).

Jurisprudence

9. **Ciens Laboratories[1] - Importance of Pharmaceutical Ingredients**

The Hon'ble Supreme Court held that the following guiding principles emerge from the discussion;

(a) when a product contains **pharmaceutical ingredients** that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not invariably decisive. What is of importance is the **curative attributes of such ingredients** that render the product a medicament and not a cosmetic.

(b) though a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over/across the counter are cosmetics. There are several products that are sold over-the-counter and are yet, medicaments.

(c) prior to adjudicating upon whether a product is a medicament or not, Courts have to see what the people who actually use the product understand the product to be. **If a product's primary function is "care" and not "cure", it is not a medicament.** Cosmetic products are used in enhancing or improving a person's appearance or beauty, whereas medicinal products are used to treat or cure some medical condition. A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients even in small quantities, is to be branded as a medicament.

10. **IPCA Health products (P) Ltd2 - Prophylactic use Vs. General Use**

The Hon'ble Supreme Court has held that products hexiprep, hexiscrup and hexiaque used for cleaning of wounds and abrasions and minor cuts and disinfecting the skin prior to surgery are classifiable under CET sub-heading 3003.10 and not under chapter heading 38.08 since these products have therapeutic properties and prophylactic use.

11. **Sarvotham Care Ltd3 - Limited Use Vs. Regular Use**

The Hon'ble Supreme Court in this case held that suggestion that shampoo should be used once a week and on other days, normal shampoos may be used, showed it was to be used like medicine, unlike other normal Shampoos. It was more so as it was not used for cleaning hair. Hence, shampoo was classifiable as medicine under sub-heading 3003.10 of Central Excise Tariff and not under sub- heading 3305.99 ibid as 'preparation for use on hair'.

12. **Shree Baidyanath Ayurved Bhavan Ltd4 - Limited Use Vs. Regular Use**

Merely because there is some difference in the tariff entries, the product will not change its character. **Something more is required for changing the classification especially when the product remains the same.**

The Hon Supreme Court in this case held that medicine is ordinarily prescribed by a medical practitioner and it is used for a limited time and not taken every day unless it is so prescribed to deal with a specific disease like diabetes. Scientific and technical meaning of the terms and expressions used in the tax laws like Excise Act not to be resorted. The goods to be classified according to the popular meaning attached to them by those using the product.

13. **Marico Industries Ltd5 - Medicinal Purpose Vs. Cleansing Purpose**

The Hon'ble Supreme Court in the case held that Mediker used for anti-lice treatment is drug

because of its **medicinal affect**. Once it is drug, it cannot be shampoo.

14. **Muller & Phipps (India) Ltd6 - Medicinal Purpose Vs. General Purpose**

It was a case of Johnson Prickly Heat Powder. This powder was again held to be a medicament because it was **not an ordinary talcum powder but a powder to be used to get rid of the problem of prickly heat.**

15. **Hindusthan Lever Ltd7 - Cure Vs. Care**

The Hon'ble Supreme Court in this case held that if a particular product is substantially for the care of skin and simply because it contains subsidiary pharmaceutical or antiseptic constituents or is having subsidiary curative or prophylactic value, it would not become medicament and would still qualify as the product for the care of the skin. There would be certain products which would be purely for the care of skin and certain other products would be clearly medicament and such cases may not pose any problem. The issue of determination as to whether a particular product falls in Chapter 33 or Chapter 30 would arise in those cases where certain products have the shades or qualities of both, namely, skin care as well as cure of skin diseases. In such cases, the necessary exercise requires tobe undertaken.

16. **Colfax Laboratories Ltd8 - Intention of Use for Prevention of Disease**

The Hon'ble Supreme Court in this case held that intended use of an article must be for treatment, mitigation or prevention of disease to come within definition of 'medicinal preparations' under Section 2(g) of Drugs and Cosmetics Act, 1940.

17. **Sanmar Electronics Corporation Ltd9 - Popular Meaning and Commercial Sense**

The High Court of Madras in this case held that interpretation regarding classification of goods to be construed in the sense in which persons who deal in such goods understand it normally. The goods must also be classified according to their popular meaning and commercial sense as well. The Court to select meaning relevant to context in which it has to interpret the word. The functional test also a relevant factor.

Summary Comments

18. From the above settled legal principles, it may be summarized that while classifying the pharmaceutical products following factors are to be considered;

(a) Curative effect of the product (therapeutic use)

(b) Preventive effect of the product (prophylactic use)

(c) Period of usage i.e, to be used for limited period or regularly

(d) Product contains curative/preventive ingredients even in small quantities

(e) License to manufacture, store and sell by FDA

(f) Reference to Pharmacopoeia or authoritative books

(g) Trade parlance, i.e, how it is known in the market

(h) Certificate by the technical experts or authorities.

19. As per World Health Organisation Guidelines on **Hand Hygiene** in Health Care issued in April 2010[10] provides the following two separate formulation for alcohol-based hand-rub

FORMULATION 1 - Final concentrations	**FORMULATION 2 - Final concentrations**
Ethanol 80% (v/v),	Isopropyl alcohol 75% (v/v),
Glycerol 1.45% (v/v),	Glycerol 1.45% (v/v),
Hydrogen peroxide 0.125% (v/v)	Hydrogen peroxide 0.125% (v/v)

The said formulation was recommended by WHO much before the spread of COVID pandemic and was for the purpose of general hand hygiene and not specifically for any curative and preventive purpose against a particular disease.

Also, with reference to a document released by the US FDA & Drug Administration[11] a specific question on whether hand sanitizer is effective against COVID-19. The response provided against the said question is as under

The best way to prevent the spread of infections and decrease the risk of getting sick is by washing your hands with plain soap and water, advises the Centers for Disease Control and Prevention (CDC). Washing hands often with soap and water for at least 20 seconds is essential, especially after going to the bathroom; before eating; and after coughing, sneezing, or blowing one's nose. If soap and water are not available, CDC recommends consumers use an alcohol- based hand sanitizer that contains at least 60% alcohol.

20. One can draw reference to the fact that even a normal soap would help in controlling the spread of infections/COVID. However, this aspect is not sufficient to classify a soap as a medicament.

21. Similarly, general alcohol-based hand sanitizer without any curative or preventive ingredients may

not be considered as a medicament and hence it would be risky to classify the same under HSN 3003. The fact is that a general sanitizer is used as an alternative to wash hands (to maintain hygiene) with normal soap. Further, the test of trade parlance and the period of usage could be a ground to be considered before classifying the said product under HSN 3003. Certificate from a technical expert may be obtained in such cases.

22. However, if the product is different from the standard hand sanitizer which is used for general hand hygiene and contains certain curative and preventive ingredients, then a view can be taken to classify it under HSN 3003, subject to satisfaction of other factors.

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GST services for non FCA s in year 20-21- what to do now?

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The pandemic has bought super powers to their knees as far as economics is concerned. Impact on India, which is in my understanding still a developing nation with dependence on imports for its manufacture is even more serious. The slow down in the economy is certain. The silver lining for the longer term is our large number of consumers, our family ties and saving philosophy. Unemployment expected to increase dramatically if the US most powerful nation is in a quandary and opening up the economy albeit at the cost of lakhs of lives being lost!! Professionals are not excluded. However, almost all sectors are looking at contracting in many ways to be able to survive. This means smaller work force (no new recruitments with lay offs of current certain) , premises, cost cutting in right earnest. Professional fees would certainly be looked at from point of view whether to continue and if continued with specific deliverables and reduced fee. In addition industry/ trade would look at the following expected situation:

1. Whether in the light of work load decreasing (reduced turnover, reduced clients etc) can the job be done in house?
2. Whether automation would replace the human time at a fraction of the cost due to speed and completeness?
3. Since procedural compliance have been deferred including GST Audit u/s 35- to postpone all such assignments till the final extension comes.
4. The cost of providing the services has actually come down as professionals are adapting to work from home- saving travel time, lower salaries, cost of physical infrastructure etc.
5. Expectation that no scrutiny assessments maybe taken up till March 21.
6. Postponement of any normal enquiry, investigation and consequent interaction/ summons etc. Only major evasion methodologies maybe followed up by revenue.
7. The revenue audits could also be deferred post March 21.
8. Industry/ trade may avoid going for advance ruling considering that they are generally revenue biased and relief not possible. Further the non operation of the tribunals may not resolve issues quickly.
9. Possibility of e-hearing for adjudication and appeals.

Suggestions for Self- Empowerment in Challenging times

A. **Knowledge Acquisition and enhancement**. Basic level- Good Commentary on GST [BGM of ICAI can be a good source) The practitioners who have awareness of the basics of GST can get deeper knowledge and the practical solutions for common issues need to known. For those who wish to advise and represent the knowledge of the settled law in the past laws would be a must. Articles, booklets, books of good authors can add different perspectives and can be referred when needed. You tube videos on IDTC of ICAI and other websites of IDT firms can also be a free source of learning.

B. **Skilling Oneself**: Most professionals need to improve their written and oral communication skills. Many online learning sites exist. We have found Udemy as value for money. Further expertise in excel + common ERP is needed to be able to provide services. Data analytical ability using tools like python etc could be an added skill to differentiate. Drafting skills can be improved by diligence. IDT committee- videos and course material on subject can enhance your service in litigation.

C. **On the job learning**: Joining an established firm could be definitely the best way forward. At this juncture they may not be interested and therefore for an intership stipend, one could join for the next 1 year.

D. **Sharing knowledge** by way of articles and answering on sites like caclub, tax guru etc may fast track learning at the same time being visible. However, quality should be ensured.

E. **Quality/ excellent Deliverables**: When opportunity is there to serve then delivering beyond expectation without link to the fees is a well tested and success model.

F. **Understand business/ Client Focus**: Understand each sector from global and all India perspective. Then look at what is applicable to the client being served. Add value to client and automatically you add value to yourself.

G. **Invest in Learning**: Spend some time and money on basic digital / physical library (many resources available free but not all).

These are my thoughts on what can be done to enhance our capacity, serve and focus on clients rather than on fees. Wish that you would be able to make yourself confident, knowledgeable, skilled to flourish in years to come. Acknowledgement to CA Pradhumna Agarwal who started and shared his thoughts on this subject, to which I have added my experience. All the best.

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