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**DEMYSTIFYING THE AMENDMENTS**

**TO**

**s.140 OF CGST ACT, 2017**

Adv. Pradeep Singh Khichi | 19.07.2020

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# OVERVIEW

## TRAN1 FORM (PART I)

- ❖ What is TRAN 1 Form and relevant Sections and Rules dealing with it?
  - ❖ What is the time limit for filing it?
  - ❖ Amendments w.r.t. time limit for filing TRAN 1.
  - ❖ What is the controversy around it?
  - ❖ Judgments of various courts on the issue.
  - ❖ Amendment in section 140 by way of section 128 Finance Act, 2020.
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# OVERVIEW

- ❖ TRANSITION OF CREDIT ACCUMULATED UNDER THE HEAD OF Education Cess (**EC**), Secondary Higher Education Cess (**SHEC**) (**SHEC**) AND Krishi Kalyan Cess (**KKC**) (PART II)
    - Amendment in section 140 by way of s.28 CGST Amendment Act, 2018.
    - Incorrect reading / interpretation of the amendment by department.
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## TRAN 1 FORM (PART I)

### ❖ What is TRAN 1 FORM?

- It is form filed by those taxpayers who are registered under the GST but may or may not be registered under the old regime and are eligible to claim credit of the tax already paid under the old regime.
  - Relevant Sections – **CHAPTER XX** Ss. 139 to 142 CGST Act, 2017
  - Relevant Rules – **CHAPTER XIV** Rules 117 to 121 CGST Rules, 2017

### ❖ What is the time limit for filing it?

- The initial time limit for filing the form was 90 days with effect from 1<sup>st</sup> July, 2017 (R.117, CGST Rules) which was extended till 27<sup>th</sup> December 2017. Post that limit has been extended from time to time by way of different notifications and orders. The commissioner was given power to extend date for those taxpayers who could not fill the form on account of technical difficulties on common portal.
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## **Amendment Post Enforcement of the CGST Act, 2017 w.r.t. time limit to file TRAN 1**

- ❖ Notification No. 48/2018 dated 10<sup>th</sup> Sep. 2018 – Inserted sub-rule 1A to Rule 117 of CGST Rules, 2017, thereby giving the power to Commissioner to extend the due date till 31.3.2019 on recommendation of General Council for persons who could not fill it before the given date on account of technical difficulties on the common portal.
  - ❖ Notification No. 49/2019 dated 9<sup>th</sup> Oct. 2019– The above mentioned date in Notification No. 48/2018 was extended till 31<sup>st</sup> December 2019.
  - ❖ Notification No. 02/2020 dated 1<sup>st</sup> January 2020 – The above mentioned date in Notification No. 49/2019 was extended till 31<sup>st</sup> March 2020.
  - ❖ In light of the abovementioned notifications the time limit was extended from time to time for those taxpayers who could not fill the form on account of technical difficulties. By way of the recent **Order No. 01/2020** dt.07.02.2020 time limit was extended till 31<sup>st</sup> March 2020.
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## **CONTD. - Amendment Post Enforcement of the CGST Act, 2017**

### **w.r.t. time limit to file TRAN 1**

- ❖ Notification No. 35/2020 dt.3<sup>rd</sup> April 2020 – Time limit for completion of any action whose time limit fell between 20<sup>th</sup> March 2020 to 29<sup>th</sup> June 2020 was extended till 30<sup>th</sup> June 2020. Thereby, indirectly extending the limit mentioned in Order No. 01/2020 for filing of TRAN 1 till 30<sup>th</sup> June 2020.
  - ❖ Notification No. 55/2020 dt.27<sup>th</sup> June, 2020 – The above mentioned time period and limit has been extended and the period which was earlier till 29<sup>th</sup> June has been extended till 30<sup>th</sup> June, 2020 and the limitation which was till 30<sup>th</sup> June, 2020 has been extended till 31<sup>st</sup> August, 2020.
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## CONTROVERSY

- ❖ The term '*technical difficulties on common portal*' is not defined anywhere either in the Act or Rules, therefore, the department had the sole discretion to decide whether the assessee could fill the form or not, on account of technical difficulty on common portal. A lot of taxpayers were not allowed to file TRAN 1 post the due date as they failed to show that they faced technical difficulty while filing the form on portal.
  - ❖ Department also denied to accept TRAN 1 form manually.
  - ❖ Aggrieved by the same a lot of taxpayers approached High Courts of respective jurisdiction by way of writ petitions, stating inter-alia that CENVAT/ITC is vested right and the same cannot be taken away.
  - ❖ Although, a lot of High Courts ruled in favor of the assesseees but a few High Courts also took an adverse view.
  - ❖ By way of such Writ Petitions vires of such Rule prescribing the time limit was also challenged but, the same was dismissed.
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## Judgments of different courts with respect to time limit prescribed in Rule 117

IN FAVOUR OF ASSESSEE -

- ❖ **Adfert Technologies Pvt. Ltd. vs. UOI and Ors. (2019 (11) TMI 282 P&H High Court)** – By way of this judgment the Court decided bunch of petition filed by assessees who either could not fill the TRAN 1 before due date or incorrect details were filed by them. The court while deciding the petitions in favor of assessees directed the department to either open the portal so that petitioners can fill the form online or accept the same manually. The judgment was challenged in the Supreme Court by way of an SLP and the same was dismissed.
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**CONTD. - Judgments of different courts with respect to time limit prescribed in Rule 117**

- ❖ **Brand Equity Treaties Ltd. vs. UOI [W.P.(C) 6537/2019] dt.17<sup>th</sup> Dec. 2019**– Writ petition was preferred on similar grounds as that of Adfert (Supra). The Delhi HC held that the period of limitation as mentioned in Rule 117 is only procedural in nature and not mandatory, therefore for the purpose of filing TRAN 1 the normal period of limitation as per the limitation act would apply i.e. 3 years, hence the due date for filing of TRAN 1 is 30<sup>th</sup> June 2020. The Court also directed that all those assesseees who were not before the court shall also be allowed to fill the form and directed the department to publish the judgment on their website. The said judgment has been stayed by the Hon'ble Supreme Court vide its order dt.19.06.2020 in **SLP(C) No. 007425 - 007428 / 2020**
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**CONTD - Judgments of different courts with respect to time limit prescribed in Rule 117**

AGAINST ASSESSEE -

- ❖ **Willowood Chemicals Pvt. Ltd. vs. Union of India, (19 G.S.T. L 228 Gujarat)** – Petitioners had challenged the validity of Rule 117 on the ground that it is ultra vires the Act and had also requested the court to direct the department to accept TRAN 1 form. The Court dismissed the petition.
  - ❖ **NELCO Limited vs. Union of India and Ors. (2020 (3) TMI 1087)** Writ petition challenging validity of Rule 117 was dismissed by Hon'ble Bombay High Court.
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## **Amendment in section 140 by way of section 128 Finance Act, 2020.**

- ❖ By way of Notification No. 43/2020, S. 128 of Finance Act, 2020 has been notified which inserts “within such time and” and other similar terms in Section 140.
    - The said amendment has been made applicable retrospectively from 01.07.2017.
    - The amendment was brought in order to nullify the effect of judgment Delhi High Court Brand Equity (Supra).
    - Recently, Delhi High Court in case of **SKH Sheet Metals Components vs. UOI and Ors.(W.P.(C) 13151/2019)**, vide its judgment dt.16.06.2020 has held that the above mentioned amendment is not going to affect its ruling in Brand Equity (Supra).
  
  - ❖ TRANSITION OF CREDIT ACCUMULATED UNDER THE HEAD OF EC, SHEC AND KCC. (PART II)
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## OVERVIEW

- ❖ Section 140(1) allowed transition of unutilized CENVAT credit under the old regime into new regime i.e. GST.
  - ❖ The taxpayers in light of S. 140(1) filed TRAN 1 form and transferred the unutilized CENVAT credit into new regime, the said credit also included the credit accumulated under the head on Education Cess (EC), Secondary Higher Education Cess (SHEC) and Krishan Kalyan Cess (KKC).
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## **AMENDMENT IN s.140 BY WAY OF s.28 of CGST AMENDMENT ACT, 2018**

- ❖ By way of the said amendment the term “of eligible duties” was inserted in sub-section (1) of section 140 and the same was notified vide Notification No. 02/2019.
  - ❖ By way of the said amendment Explanation 1 and 2, which defines the scope of expression “eligible duties”, which already existed before amendment of 2018 were also made applicable upon sub-section (1) of section 140, but the same has not been notified yet, therefore the term “eligible duties” remains unexplained.
  - ❖ By way of the said amendment Explanation 3 was also inserted into section 140, which excluded any kind of Cess from the expression “eligible duties and taxes” not specifically included in Explanation 1 and 2.
  - ❖ Amendment has been applicable retrospectively from 01.07.2017.
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## **Incorrect interpretation and current status of said the amendment**

- ❖ The notification no. 02/2019 only notifies the part which inserts term “of eligible duties” in sub-section (1) of section 140 and does not notify that part which inserts sub-section (1) in Explanation 1&2 thereby the meaning of the expression “of eligible duties” remains unexplained and uncertain as the expression has not been defined.
  - ❖ In purview of the amendment the department has issued Show Cause notices to Taxpayers asking them to reverse the credit not falling under the meaning of expression “of eligible duties”, inter-alia stating that the same has been wrongly availed.
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## **Incorrect interpretation and current status of said the amendment**

- ❖ By way of said Show Cause notices the department has specifically asked to reverse credit which was accumulated under the head of EC, SHEC and KCC as the same is not included under Explanation (I) and (II).
  - ❖ The said Show Cause notices are based on incorrect premise and the same are without jurisdiction as the part of the amendment which defines the meaning of “eligible duties” as mentioned in section 140(1) has not been notified yet.
  - ❖ The constitutional validity of the amendment has also been challenged before various High Courts across the Country, which be held to be premature in nature as the whole amendment has not been notified yet.
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# THANK YOU

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