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TREADING THE GST PATH - XLI CBEC'S LITTLE BOY

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CBEC has issued a circular No. 33/7/2018 Dt. 23.02.2018, under section 168 of the CGST Act, 2017, the impact of which is going to be not less than the Little boy dropped in Hiroshima. To put it briefly, the circular says that if any of the cenvat credit, the eligibility of which is under dispute and the same is disallowed through an Order in Original (OIO) / Order in Appeal (OIA), under the erstwhile law, such credit cannot be carried forward as transitional credit and if carried forwarded, the same cannot be utilised to discharge any GST liability.

Section 168 (1) reads as below.

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

The instructions are two fold.

- If there was a dispute on entitlement for cenvat credit and if any OIO or OIA has been passed disallowing such credit, such credit, if carried forwarded into GST regime as transitional credit, cannot be utilised under GST regime for payment of GST liabilities, so long as the OIO / OIA is in existence. If such credit is utilised it shall be recovered.
- Any credit which is barred under Section 17(5) of the CGST Act, 2017, if carried forwarded under the transitional provisions, such credit should not be utilised. If such credit is utilised it shall be recovered.

The after effects of this circular is going to be much more severe than that of the Little Boy. The following issues emerge out of this circular.

- (i). What is the position if an appeal has been filed against such OIO / OIA and such appeal is pending before the appellate forums? If such appeal was filed before 06.08.2014, appropriate pre deposit as ordered by the appellate forum would have been paid or the appellate forum would have granted complete waiver of any pre deposit and stayed the recovery. In case of appeals filed after 06.08.2014, the prescribed mandatory pre deposit would have been paid.

In such situation the operation of the said OIO / OIA is considered to have been stayed. Reference is also invited to the CBEC Circular NO. 948/8/2014 Dt. 16.09.2014.

4.2 No coercive measures for the recovery of balance amount i.e., the amount in excess of 7.5% or 10% deposited in terms of Section 35F of Central Excise Act, 1944 or Section 129E of Customs Act, 1962, shall be taken during the pendency of appeal where the party/assessee shows to the jurisdictional authorities :

- (i) proof of payment of stipulated amount as pre-deposit of 7.5%/10%, subject to a limit of Rs. 10 crores, as the case may be; and
- (ii) the copy of appeal memo filed with the appellate authority.

4.3 Recovery action, if any, can be initiated only after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F/129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme Court. The recovery, in such cases, would include the interest, at the specified rate, from the date duty became payable, till the date of payment

(ii) It may be noted that all cenvat credit availed by an assessee in respect of various inputs, input services and capital goods are pooled together in a single Cenvat Account and once the credit is taken, the identity of the input, input service and capital goods, in respect of which such credit has been taken is lost. How to decide whether the credit which was disallowed vide an OIO / OIA is part of the balance of credit as on 30.06.2017, which is carried forwarded as transitional credit, or not?

(iii) The instruction says that if any of the credit blocked under Section 17 (5) of the CGST Act is part of the transitional credit carried forwarded, the same shall not be utilised and if utilised, the same be recovered. Out of the single closing balance of credit available on 30.06.17 and carried forwarded as transitional credit, how to identify the quantum of such blocked credit?

(iv) There may be a case, where the credit was entitled as per the provisions of Cenvat Credit Rules, 2004, but the same is barred under Section 17 (5) of the CGST Act, 2017. {Example – Goods purchased for distribution as free sample are entitled for credit under CCR, 2004 but not under Sec.17 (5)}

(v) The instructions talk only about the disputes involving denial of credit, pending at the level of OIO / OIAs. It seems that if the disputes are pending in High Court, there is no bar in carrying forward such credit and utilising the same under GST regime.

(vi) The circular uses two expressions “till the OIO / OIA is in existence” and “the OIO / OIA is in operation”. An OIO / OIA, against which a stay order has been passed by the appellate forum (either with a direction for payment of pre deposit or without any pre deposit), though in existence, its operation stands stayed. Similarly when the mandatory pre deposit is paid and the appeal has been filed, it shall be considered that the operation of the said OIO /OIA stands stayed, though such order is in existence. To what type of cases, this circular would apply? A harmonious reading of the same may suggest that the Circular would have operation only when no appeal is filed against the said OIO / OIA or when there is no stay against the said OIO / OIA by the appellate forum.

On the eve of new year in 2013, the CBEC has issued a circular No. 967/1/2013 Dt. 01.01.2013 regarding recovery of confirmed demands during the pendency of appeals which increased the GDP of advocate community by leaps and bounds. Thanks to CBEC for a repeat in 2018.

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