

Tax paid under erstwhile regime is permissible to carry forward under GST regime as credit in the electronic credit ledger - Madras High Court

6 April 2022



Summary

The Madras High Court (HC) allowed credit of service tax paid under RCM [after the introduction of the Goods and Services Tax (GST) tax], which could not be availed as transitional credit. The HC ruled that chance of seeking refund or credit cannot be denied merely because transitional provision has come into effect and credit could not be claimed under Section 140(1). The HC observed that the taxpayer should not be rendered remediless and, hence, invoked the doctrine of necessity as HC felt it a dire necessity for the legislation to address such situations. The HC noted that if the GST regime had not come into effect, the petitioner would have been eligible to claim CENVAT credit of all the amounts paid. Thus, the HC suggested the Revenue to carry forward the credit in the electronic credit ledger of the petitioner.

Facts of the case

- The petitioner¹ is engaged in providing various construction services to the government/private parties. During the CERA audit, it was pointed out that the petitioner is liable to pay service tax under RCM on services rendered at quarries for which royalty was paid to the government.
- Such service tax was paid in December 2017 and, therefore, the petitioner could not file application under form GST TRAN-1 for transfer of credit under GST as the due date had elapsed.
- The petitioner had filed refund application of the said amount which had been rejected by the Revenue on the ground that there is no provision available in the new regime to allow such credit.
- Aggrieved petitioner filed the present writ petition² seeking cash refund or ITC under GST laws.

Madras HC observations and ruling³:

- **Eligibility to avail transitional credits:** The HC observed that the petitioner is eligible to avail the credit of service tax paid by him on the input services. However, since the

payment of tax was done post due date, the credit was not available. Therefore, the petitioner could not file GST TRAN-1 and failed to carry forward the credit into the GST regime. The HC examined that if the new regime had not come into effect, the petitioner would have availed such credit. Hence, there is no dispute regarding the eligibility of petitioner.

- **Refund claim is not tenable:** The provision⁴ provides for refund claims by way of cash. Based on such provision, the petitioner had filed a refund application. However, in the erstwhile law, the petitioner's eligibility was only confined to taking credit and there is no provision in the new regime to allow refund as input tax credit in GST/credit in electronic cash ledger/payment in cash. Thus, the relief cannot be stretched upon to a claim refund.
- **CENVAT credit is a concession:** It was observed that the facility of credit of service tax paid under RCM is a concession. It shall only be availed in the manner prescribed by law. However, the HC was of the view that

¹ SRC Projects Private Limited

² W.P.No.1092 of 2019

³Order dated 22 Feb 2022

⁴ Section 142(3) of the CGST Act, 2017

refund application could have been considered for taking credit and carrying forward in the electronic ledger.

- **Dire necessity to invoke 'doctrine of necessity'**: There exists transitional provision for the purpose of claiming ITC under the GST regime. However, the said provision⁵ is not applicable to the present case. Considering the peculiar nature of the present case, the HC invoked the 'doctrine of necessity' and allowed the petitioners credit of service tax paid, which could not be availed as transitional credit under GST provisions.

Our comments

This is one of the important rulings pronounced by the Madras High Court w.r.t. transitional credits under the GST regime, wherein it is held that though the refund of payment of taxes related to earlier regime is not available, but credit is permitted in the electronic credit ledger.

Contrary to the present ruling, the CESTAT Delhi, in the case of Flexi Caps and Polymers Pvt Ltd.,⁶ held that credit eligible under erstwhile regime is available as refund under the GST regime and any amount eventually accruing shall be paid in cash. Similarly, in case of Terex India Pvt. Ltd.,⁷ the CESTAT, Chennai had held that the claim is only for refund and not proceedings for assessment or adjudication. Thus, transitional credit of taxes paid under the erstwhile law is available under Section 142(3) of the CGST Act. Even, in case of Bharat Heavy Electricals Ltd.,⁸ the CESTAT Delhi allowed cash refund of the credit admissible under erstwhile laws in terms of provisions of the GST laws.

There are many other judgments pronounced by judicial authorities wherein transitional credit from erstwhile regime and its refund by way of cash or credit has been dealt with.

The present ruling is of welcoming nature, which will provide relief to taxpayers who had to pay taxes under the erstwhile regime post 1 July 2017, with bright spot to have ITC permissible under the GST regime.

⁵ Section 140 (1) of the CGST Act, 2017

⁶ Excise Appeal No. 50114 of 2020

⁷ Service Tax Appeal No. 40095/2021- SM

⁸ Final Order No. 51849/2019 dated 26 April 2019

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