An unfair amendment

It restricts pre-GST tax credit to businessmen

ADITHYA REDDY

Back in December 2018, the GST Council pointed out that GST is only a tax on value addition, and so interest can be demanded either only for late payment of GST on the value addition or the portion of the GST payable after adjusting input tax credit. Though the law was amended to clarify this position several months later, the amendment is yet to be notified, allowing the taxman to keep raising large demands for interest on the entire GST liability of businessmen.

While this is the fate of amendments that are beneficial to businesses, the government was quick to notify Section 128 of the Finance Act 2020 on May 18, in the middle of the nationwide lockdown and within days of a relevant Delhi High Court judgment. This Section retrospectively amends Section 140 of the GST Act to empower the government to prescribe a time limit for businessmen to carry forward the tax credit available to them under the pre-GST tax laws. This credit represented the taxes paid on purchases before the GST regime, which became available for set-off against future tax liabilities. If not for the GST, beneficiaries of this credit would have continued using it without any hindrance for as long as it lasted. The GST laws provided a mechanism to transition this credit so that it can continue to be used against GST liabilities.

However, a rule was introduced prescribing a time limit of a few months to fulfill the formalities for this transition. People who missed the bus, even for genuine reasons beyond their control, were denied the benefit of this credit. This led to a spate of litigations in courts.

Multiple high courts held that this time limit cannot deprive someone of a right that he earned after meeting all requirements under the law as it stood at the relevant time. The Gujarat High Court held such a restriction to be arbitrary, violative of a person’s fundamental right to do business and the constitutional right to property (Sidharth Enterprises Vs Nodal Officer, September 6, 2019).

One of the issues raised in some of these cases was whether such a time limit could have been prescribed in a rule as opposed to the main provisions of the GST Act itself. The Finance Act 2020, therefore, amended Section 140 of the CGST Act to provide for this restriction in the Act itself. The amendment takes effect from the inception of the GST, thereby attempting to nullify the benefit obtained by all persons who approached the courts till now.

Most importantly, as pointed out by the Delhi High Court in its latest decision (SKH Metal Sheet Components Vs UOI, June 16, 2020), the amendment will make no difference to the prevailing legal position, because the ground on which the various high courts allowed relief to businessmen was not restricted by the fact that the time limit was not mentioned in the main Act. If that had been the case, the amendment would have cured the defect.

The major ground on which the high courts based their decisions was that the right of credit which accrued to businessmen under the earlier tax laws became final or ‘vested’, and therefore could not be disturbed by a change in law. But officers are likely to rely on this amendment to refuse requests of businessmen to accepted belated transitional credit, thereby forcing more people to litigate in courts. Uncertainty is likely to remain till the Supreme Court decides on the appeals filed by the department.

This is not the first time the government has introduced retrospective amendments to GST law either to deny benefits or overturn court judgments that have been favourable to businesses. It only shows how far away we are from a tax regime based on certainty.

The writer is an advocate at the High Court of Madras.