GST ARTICLE

Roadblock for input tax credit of expenditure incurred on Corporate Social Responsibility

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Budget 2023 has set forth a proposal of myriad of amendments, including those having a major implication in the hands of assessees at large. Amongst others, one of the amendments pertain to restriction of input tax credit (ITC) on goods or services used or intended to be used for activities relating to the obligations of such assessee under Corporate Social Responsibility (CSR) as specified under Section 135 of the Companies Act, 2013.

Before we delve deeper in understanding the implications on the contentious issue, let us examine the proposed amendment in Section 17(5) of the Central Goods and Services Tax Act, 2017[1] (**"CGST Act"**), which is extracted herein-below:

> *Section 17(5). Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-*
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> ***"(fa) goods or services or both received by a taxable person, which are used or intended to be used for activities relating to his obligations under corporate social responsibility referred to in section 135 of the Companies Act, 2013;"***

On a perusal of the aforesaid provisions, it can be inferred that prior to the proposed amendment, the GST Laws did not carve out a blanket exclusion for input tax credit of expenditure incurred by organizations towards CSR. However, despite the absence of an exclusion to such effect, the legal position prior to the aforesaid amendment seemed to be quite unsettled in light of the slew of contradictory advance rulings on the subject matter.

In certain judgments of the Advance Ruling Authorities such as ***In Re: M/s. Bambino Pasta Food Industries Private Limited*** - *2022-VIL-293-AAR* and ***In Re: M/s. Dwarikesh Sugar Industries Limited*** - *2021-VIL-168-AAR*, the input tax credit was allowed on the ground that the expenditure made towards corporate responsibility under Section 135 of the Companies Act, 2013, is made in the furtherance of the business, which is allowable under Section 16 of the CGST Act. However, in other judgments such as ***In Re: M/s. Adama India Private Limited*** - *2021-VIL-355-AAR* and ***In Re: M/s. Polycab Wires Private Limited*** - *2019-VIL-100-AAR*, the said credit has been disallowed on the ground that the CSR activities are not undertaken in the normal course of business.

In this context, one may also look at the legal position laid down by the Courts in the erstwhile regime. In the case of ***Essel Propack Ltd. v. Commissioner of CGST, Bhiwandi*** - *2018-VIL-621-CESTAT-MUM-ST*, it was held that CSR expenses fell within the ambit of "activities related to business" and thus qualified as 'input services', which was duly eligible for CENVAT Credit. However, in the case of ***M/s. Power Finance Corporation Ltd. Versus Commissioner (Appeal), Central Excise & Service Tax, LTU, New Delhi*** - *2022-VIL-437-CESTAT-DEL-ST*, the Hon'ble Tribunal held that the Order in the case of ***Essel Propack (supra)*** had failed to lay down the correct law as the definition of 'input service' under Cenvat Credit Rules, 2004 does not include "activities

relating to business". Consequently, the Cenvat Credit of CSR was held to be inadmissible.

In the aforesaid background, one may observe that the taxpayers were already facing hiccups in respect of the eligibility of credit under the erstwhile regime. However, the provisions under the GST Law[2] allowed the credit of supplies used or intended to be used in the course or furtherance of business. The term business[3] has been given a wide definition under the GST Law, thereby retaining the possibility to include the expenses incurred for CSR under the scope of credit eligibility under Section 16 of the CGST Act.

Be that as it may, after the proposed amendment has been introduced under the CGST Act, there remains no ambiguity on the fact that the credit of the CSR expenses would not be eligible in the hands of the organizations. While the proposed amendment pertaining to the denial of credit of CSR seems to be simple in nature, one needs to examine the ramifications of the said concept.

One of the most important questions to be answered is whether the said amendment is prospective or retrospective in nature. It is a settled principle of statutory construction that every statute is *prima facie prospective* unless it is expressly or by necessary implications made to have retrospective operations. Legal Maxim *"nova constitutio futuris formam imponere debet non praeteritis"*, i.e., 'a new law ought to regulate what is to follow, not the past', contains a principle of presumption of prospectively of a statute. In the present case, the introduction of a new provision specifying an exclusion towards credit of CSR seems to be applicable prospectively in light of the judicial precedents on the potential issue of dispute.

At this juncture, one may also note that the contribution towards CSR can be made either directly in the form of goods or services or monetary donation, or indirectly through other agencies. Thus, another important aspect which needs

to be deliberated upon is whether the contribution made in each and every form towards CSR is covered in the exclusion per se or not.

Accordingly, the industry needs to cautiously identify and determine the goods or services which are used or intended to be used for activities relating to its obligations under CSR. In our view, it is advisable that a detailed exercise may be carried out to safeguard the interests of the organization so that the assessees are not liable for reversal of undue credit pertaining to CSR and can breathe a sigh of relief going forward.

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(The views expressed in this article are strictly personal.)

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[1] Similar reference to respective State GST laws, unless specified otherwise.
[2] Section 16 of the CGST Act
[3] Section 2(17) of the CGST Act