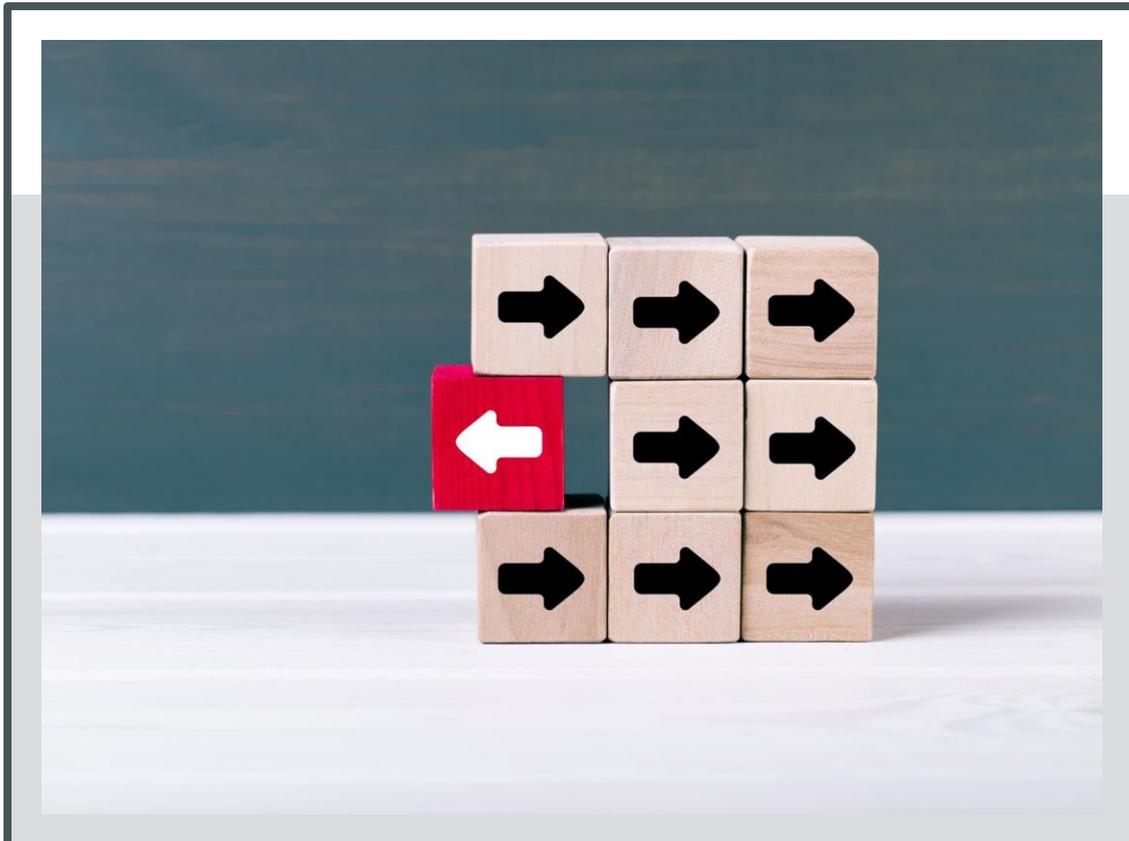


HANDLING OF ITC RELATED LITIGATIONS AND NOTICES

-BY CA DR ARPIT HALDIA



WHETHER ITC IS A VESTED RIGHT OR CONCESSION



Article 300A

No person shall be deprived of his property save by the authority of law.

Salient Features of Article 300A

Part-1-Article 31(1) laid down that no person could be deprived of his property without the authority of law. This provision was been repealed through the 44th Amendment but it re-appeared as Art. 300A.

Part-2-A Law means a valid law. Such a law will therefore be subject to other provisions of the Constitution, e.g., Arts. 14, 19(1)(g)- *Shanthalakshmi And Ors. vs State Of Tamil Nadu And Ors. on 21 August, 1981 Equivalent citations: AIR 1983 Mad 232, (1983) IIMLJ 7*

Part-3-The expression 'law', within the meaning Article 300A, would mean a Parliamentary Act or an Act of the State Legislature or a statutory order having the force of law-*Hindustan Times & Ors vs State Of U.P. & Anr on 1 November, 2002 (SC)*

Part-4-A person cannot be deprived of his property merely by Executive Fiat-*Bishambhar Dayal Chandra Mohan ... vs State Of Uttar Pradesh & Ors on 5 November, 1981 Equivalent citations: 1982 AIR 33, 1982 SCR (1)1137*

THE LEGAL MAXIM –

Lex not cogit
impossibila

- Law does not compel a man to do that which he cannot possibly perform

What does “Lex not cogit impossibila (law does not compel a man to do that which he cannot possibly perform)” lays down

The statue viz. Section 54EC of the Act provides for exemption from tax to long term capital gain provided the same is invested in bonds of Rural Electrification Corporation Limited or National Highway Authority of India. However, as the bonds were not available, it was impossible for the respondent-assessee to invest in them within six months of the sale of their factory building. Commissioner Of Income Tax vs M/S. Cello Plast on 27 July, 2012 (Bom HC)

Where the law creates a duty and the party is disable to perform it without any default in him and has no remedy over there, the law will excuse him -The Inter College, Through Its ... vs The State Of U.P. Through ... on 6 January, 2006 (All HC)

It has been indicated therein that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor - State Of Rajasthan & Anr vs Shamsheer Singh on 1 May, 1985 Equivalent citations: 1985 AIR 1082, 1985 SCR Supl. (1) 83

MATCHING CONCEPT
FOR THE INPUT TAX
CREDIT AVAILED UPTO
9TH OCTOBER 2019 -
PRIOR TO INSERTION
OF RULE 36(4) OF CGST
RULES, 2017

Was there any provision uptill that Date.....



Relevant Section and Rules for Matching of Input Tax Credit

- **Section 16- Eligibility and conditions for taking input tax credit**
- **Section 38-Furnishing details of inward supplies**
- **Section 39-Furnishing of Returns**
- **Section 41-Claim of input tax credit and provisional acceptance thereof-(Please Take note that Section 16(2)(c) is subject to the provisions of Section 41)**
- **Section 42-Matching, reversal and reclaim of input tax credit**

Relevant Section and Rules for Matching of Input Tax Credit

- **Rule 60. Form and manner of ascertaining details of inward supplies. Subs. by CGST (Thirteenth Amendment) Rules, 2020 (S.No.606) dated 10.11.2020 w.e.f. 01.01.2021 for "Rule 60. Form and manner of furnishing details of inward supplies.**
- **Rule 69. Matching of claim of input tax credit.**
- **Rule 70. Final acceptance of input tax credit and communication thereof**
- **Rule 71. Communication and rectification of discrepancy in claim of input tax credit and reversal of claim of input tax credit.**
- **Rule 72. Claim of input tax credit on the same invoice more than once.**

Section 16(2)(c) and Section 41 of CGST Act, 2017

Section-41-Claim of input tax credit and provisional acceptance thereof.—

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, **be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.**

Section 16(2)(c)- subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply;

Section 16(2)(c) and Section 41 of CGST Act, 2017

Last date to avail input tax credit in respect of invoices or debit notes relating to such invoices pertaining to period from July, 2017 to March, 2018-PRESS RELEASE 18.10.2018

It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. The apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 is unfounded as the same exercise can be done thereafter also.

Implications for non-compliance of Section 42 of CGST Act for Non-Matching of ITC by GSTR-2A

Part-1-Provisions of Section 42 are applicable only in cases for matching, reversal and reclaim of Credit and are based on details of inward supply furnished by the registered person

42. Matching, reversal and reclaim of input tax credit.—

(1) The details of every inward supply furnished by a registered person (hereafter in this section referred to as the –recipient) for a tax period shall, in such manner and within such time as may be prescribed, **be matched--**

Part-2-Details of Inward Supply in GSTR-2 were required to be filed under Section 38 of CGST Act, 2017

Provision of Section 38 of the CGST Act, 2017 are as follows:

(5) Any registered person, who has furnished the details under sub-section (2) for any tax period and which have remained unmatched under section 42 or section 43, shall, upon discovery of any error or omission therein, rectify such error or omission in the tax period during which such error or omission is noticed in such manner as may be prescribed, and shall pay the tax and interest, if any, in case there is a short payment of tax on account of such error or omission, in the return to be furnished for such tax period:

Therefore, the basic premises of Section 42 rested upon the details of inward supply furnished under Section 38. The return to be furnished under Section 38 was GSTR-2.

Implications for non-compliance of Section 42 of CGST Act for Non-Matching of ITC by GSTR-2A

Part-3-That the time limit for furnishing GSTR-2 in Section 38 has not been notified till date-

Lets take an example for the Year 2017-18. Para 2 of Notification No. 44/2018-Central Tax Dated 10th September 2018 provided as follows:-

The time limit for furnishing the details or return, as the case may be, under subsection (2) of section 38 and sub-section (1) of section 39 of the said Act, for the months of July, 2017 to March, 2019 shall be subsequently notified in the Official Gazette.

It is pretty clear from the above that return under section 38 have not been notified in official gazette till date.

Part-4-Rule 69 of CGST Rules provide that the matching under Section 42 of CGST Act, 2017 of Details of Inward Supply should be extended if the due date of filing of GSTR-2 under section 38 has been extended and prescribed mechanism itself is not in place

69. Matching of claim of input tax credit .-The following details relating to the claim of input tax credit on inward supplies including imports, provisionally allowed under section 41, **shall be matched under section 42 after the due date for furnishing the return in FORM GSTR-3-**

- (a) Goods and Services Tax Identification Number of the supplier;
- (b) Goods and Services Tax Identification Number of the recipient;
- (c) invoice or debit note number;
- (d) invoice or debit note date; and
- (e) tax amount:

Implications for non-compliance of Section 42 of CGST Act for Non-Matching of ITC by GSTR-2A

Part-4-Rule 69 of CGST Rules provide that the matching under Section 42 of CGST Act, 2017 of Details of Inward Supply should be extended if the due date of filing of GSTR-2 under section 38 has been extended and prescribed mechanism itself is not in place

Provided that where the time limit for furnishing FORM GSTR-1 specified under section 37 and FORM GSTR-2 specified under section 38 has been extended, the date of matching relating to claim of input tax credit shall also be extended accordingly:

Since matching under Section 42 is only possible on filing of details of inward supplies under Section 38 and date of filing of Return under GSTR-2 under section 38 has not been notified till date, therefore the date of matching by virtue of First Proviso to Rule 69 has also been extended. Once the date of matching under Section 42 read with Rule 69 has been extended then any action on account of non-compliance of discrepancies as highlighted under the provision of Section 42 cannot be initiated.

Provisions of Section 42 are a complete code in itself. Once the section is complete code in itself and it provides a manner and the procedure for doing the things and if the system itself is not in place for compliance of provisions of that section, then in such case there cannot be a case for non-compliance of the provisions contained in the section itself.

Can the substantive right of Input Tax Credit be denied on the basis of procedural lapse by the Supplier and distinction between a wilful defaulter and the rest

There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It would be erroneous to attach equal importance to the non-observance of all the conditions irrespective of the purposes they were intended to serve - **Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner**, reported in 1991 (55) E.L.T. 437 (S.C.),

It is not an obstruction in the implementation of the provisions of the Act, but an aid. The procedures are handmaid and not the mistress. It is a lubricant and not a resistance. A procedural law should not ordinarily be construed as mandatory; the procedural law is always subservient to and is in aid to justice. **Any interpretation which eludes or frustrates the recipient of justice is not to be followed** - **Sambhaji and Others v. Gangabai and Others**, reported in (2008) 17 SCC 117, has held that procedure cannot be a tyrant but only a servant

Can the substantive right of Input Tax Credit be denied on the basis of procedural lapse by the Supplier and distinction between a wilful defaulter and the rest

Indusr Global Ltd v. Union of India, 2014 (310) ELT 833 (Guj) wherein the Court was considering vires of Rule 8 (3A) of the Central Excise Rules, 2002 which provided that if an assessee defaults in payment of duty beyond thirty days from the date prescribed under sub-rule (1) then notwithstanding anything contained in the sub-rule(1), the assessee shall pay excise duty for each consignment at the time of removal without utilizing the CENVAT credit till the assessee pays the outstanding amount including interest. The Court while striking down such Rule unconstitutional observed as under:

"31. This extreme hardship is not the only element of unreasonableness of this provision. It essentially prevents an assessee from availing cenvat credit of the duty already paid and thereby suspends, if not withdraws, his right to take credit of the duty already paid to the Government. It is true that such a provision is made because of peculiar circumstances the assessee lands himself in. However, when such provision makes no distinction between a willful defaulter and the rest, we must view its reasonableness in the background of an ordinary assessee who would be hit and targeted by such a provision.

Inadvertent Reporting Error Committed by the Supplier in Filing GSTR-1

Sun Dye Chem Vs. The Assistant Commissioner (ST) [2020 VIL 524 (Mad)]

There was an inadvertent error in reporting in Form GSTR-1 in regard to the outward supplies and as a result, Intra-state sales had been erroneously reported as inter-state sales. The error was noticed by the Petitioner when its customers brought to its notice the fact that the tax credit has been reflected in the IGST column instead of CGST/SGST columns posing a difficulty to the customers to avail the said credit. The Petitioner submitted a request for amendment of Form GSTR-1 that came to be rejected on August 12, 2019 on the ground that there was no provision to grant the amendment sought, in any event, not after March 31, 2019 as Notification No. 71/2018- Central Tax dated December 31, 2018 had extended the time for submission of the amended GSTR-1 till March 31, 2019, for the period 2017-18.

17.Admittedly, Forms in GSTR-2A and GSTR-1A are yet to be notified as on date. The statutory procedure contemplated for seamless availment is, as on date, unavailable.

19.However, and also admittedly, the Forms, by filing of which the petitioner might have noticed the error and sought amendment, viz. GSTR-2A and GSTR-1A are yet to be notified. Had the requisite Forms been notified, the mismatch between the details of credit in the petitioner's and the supplier's returns might well have been noticed and appropriate and timely action taken. The error was noticed only later when the petitioners' customers brought the same to the attention of the petitioner.

20. In the absence of an enabling mechanism, I am of the view that assessee should not be prejudiced from availing credit that they are otherwise legitimately entitled to. The error committed by the petitioner is an inadvertent human error and the petitioner should be in a position to rectify the same, particularly in the absence of an effective, enabling mechanism under statute.

Inadvertent Reporting Error Committed by the Supplier in Filing GSTR-1

Pentacle Plant Machineries Pvt. Ltd. Vs 1. Office of the GST Council

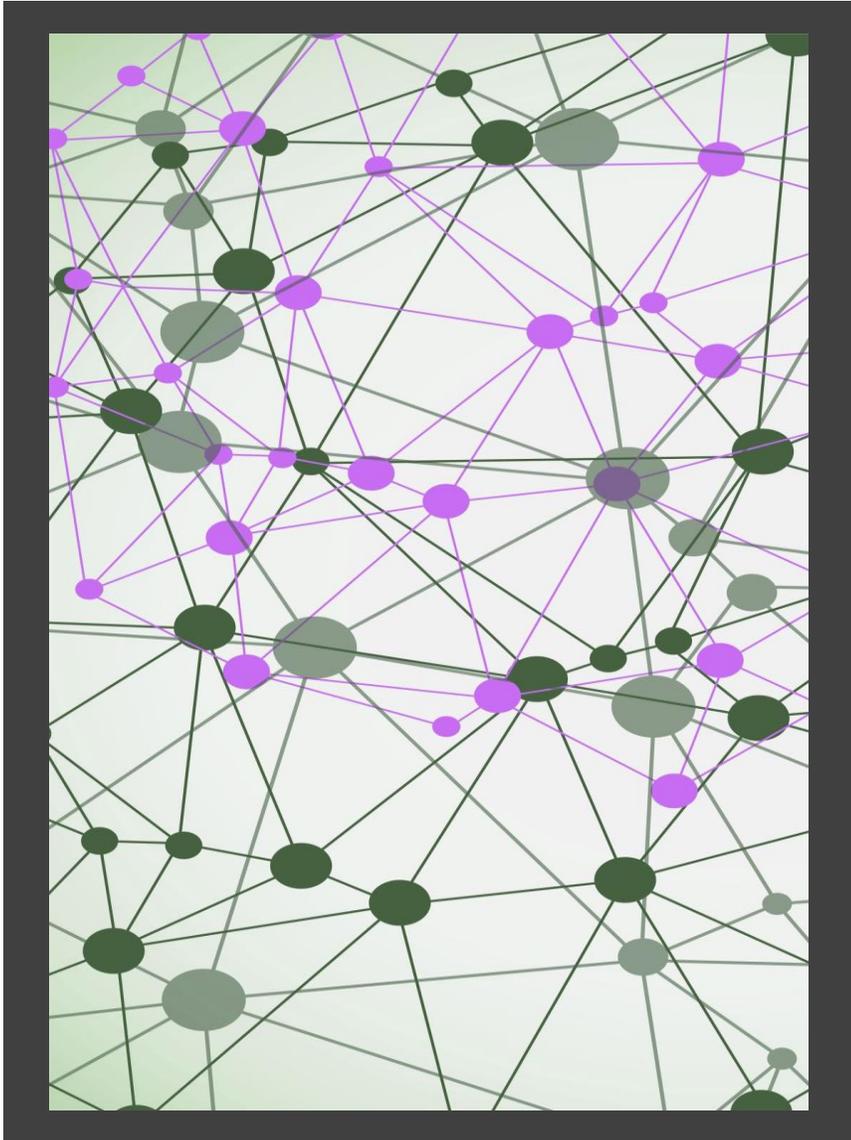
Petitioner sought a mandamus directing the respondents to rectify the mistake in its GSTR-1 return, wherein it, instead of the GST number of the purchaser in Andhra Pradesh, mentioned the GST number of the purchaser in Uttar Pradesh and credit was sought to be denied to the recipient on account of the error committed by the supplier.

5. *Had the requisite statutory Forms been notified, this error would have been captured in the GSTR-2 return, an online form, wherein the details of transactions contained in the GSTR-3 return would be auto-populated and any mismatch noted. Likewise, had the GSTR-1A return been notified, the mismatch might have been noticed at the end of the purchaser/recipient. However, neither Form GSTR-2 nor Form GSTR-1A have been notified till date. No doubt, the time for modification/amendment of a GSTR-3B return was extended till the 31st of March 2019, which benefit the petitioner did not avail since it was unaware that a mistake had crept into its original returns.*

However, the credit claimed on the basis of accompanying invoices has been denied solely on account of the mismatch in GSTR number. It is only on 15.07.2019 when the recipient notified the petitioner of the rejection of the credit, seeking amendment of the return, and threatening legal action, that the petitioner came to be aware of the mismatch.

The Hon'ble High Court relying upon the decision of *Sun Dye Chem Vs. The Assistant Commissioner (ST) [2020 VIL 524 (Mad)]*.

To summarise, since Forms GSTR-1A and GSTR-2 (erroneously mentioned as GSTR-2A in para-17 of order dated 06.10.2020 in WP.No.29676 of 2019) are yet to be notified, the petitioner should not be mulcted with any liability on account of the bonafide, human error and the petitioner must be permitted to correct the same.



- **Matching Concept for the Input Tax Credit availed after 9th October 2019-Insertion of Rule 36(4) of CGST Rules, 2017-**
 - Validity of GSTR-2B i.e. Credit upto due date of filing of GSTR-1**
 - Validity of Rule 36(4)**
 - ITC Eligibility for Invoices uploaded by Supplier after September of next Financial Year**

Rule 36(4)-Bare Provision

Input tax credit to be **availed** by a **registered person in respect of invoices or debit notes**, the **details of which have not been uploaded by the suppliers under sub-section (1) of section 37**, shall not exceed **5 per cent** of the **eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37**.

Provided that the said condition shall apply **cumulatively** for the period **February, March, April, May, June, July and August, 2020** and **the return in FORM GSTR-3B for the tax period September, 2020** shall be furnished with the **cumulative adjustment of input tax credit for the said months in accordance with the condition above**.

Relevant Rule, Notification and Circular

✓ Relevant Rule - Rule 36(4)

✓ Relevant Notification -

- **Insertion of Rule 36(4)-
Notf. No. 49/2019-CT
dt. 09.10.2019**

✓ Relevant Circular -

- **Circular No. 123/42/2019-
GST Dt. 11thNov, 2019**
- **Circular No. 142/12/2020-
GST Dated 11th October
2020**

Invoices uploaded by the Supplier after date prescribed under Section 16(4)

Section 16(4) provides that the a registered person shall take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

That there is no such restriction under section 16(4) of CGST Act, 2017 that details of such invoices should have been uploaded by the supplier by the due date of statement under section 37 of CGST Act, 2017 for the month of September of the next financial year. The requirement somewhere comes from Section 42(7) of CGST Act, 2017 for uploading of missing invoices by the due date prescribed in Section 39(9). The section is reproduced hereunder-

(7) The recipient shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5), if the supplier declares the details of the invoice or debit note in his valid return within the time specified in sub-section (9) of section 39.

Can Circular No. 123/42/2019 Dated 11/11/2019 and Circular No. 142/12/2020-GST Dated 11/10/2020 insert a new condition-Impact of GSTR-2B

Part-1-FORM GSTR-2A being a dynamic document, what would be the amount of input tax credit that is admissible to the taxpayers for a particular tax period in respect of invoices / debit notes whose details have not been uploaded by the suppliers?-Circular No. 123/42/2019 Dated 11th November 2019

The amount of input tax credit in respect of the invoices / debit notes whose details have not been uploaded by the suppliers shall not exceed 20% of the eligible input tax credit available to the recipient in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub- section (1) of section 37 as on the due date of filing of the returns in FORM GSTR-1 of the suppliers for the said tax period. The taxpayer may have to ascertain the same from his auto populated FORM GSTR 2A as available on the due date of filing of FORM GSTR-1 under sub-section (1) of section 37.

Part-2-Circular No. 142/12/2020-GST Dated 11th October 2020

The cumulative amount of ITC availed for the said months in FORM GSTR-3B should not exceed 110% of the cumulative value of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37 of the CGST Act, till the due date of furnishing of the statements in FORM GSTR-1 for the month of September, 2020.

Can Circular No. 123/42/2019 Dated 11/11/2019 and Circular No. 142/12/2020-GST Dated 11/10/2020 inserts a new condition-Impact of GSTR-2B

Part-3-Executive instructions cannot amend or supersede the statutory Rules or add something therein

Hon'ble Apex Court in the matter of **State of U.P. &ors. Vs. Babu Ram Upadhyaya, AIR 1961 SC 751; and State of Tamil Nadu Vs. M/s. Hind Stone etc., AIR 1981 SC 711** wherein it was held that Executive instructions cannot amend or supersede the statutory Rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law provided the same are not in conflict with the provisions of the Act.

It is settled legal proposition that executive instructions cannot override the statutory provisions.

- a) B.N. Nargajan Vs. State of Mysore, AIR 1966 SC 1942;
- b) Sant Ram Sharma Vs. State of Rajasthan &ors., AIR 1967 SC 1910;
- c) Union of India &ors. Vs. MajjiJangammya&ors., AIR 1977 SC 757;
- d) B.N. Nagarajan&ors. Vs. State of Karnataka &ors., AIR 1979 SC 1676;
- e) P.D. Agrawal &ors. Vs. State of U.P. &ors., (1987) 3 SCC 622; M/s. Beopar
- f) Sahayak (P) Ltd. &ors. Vs. VishwaNath&ors., AIR 1987 SC 2111;
- g) State of Maharastra Vs. JagannathAchyutKarandikar, AIR 1989 SC 1133;
- h) PaluruRamkrishhananiah&ors. Vs. Union of India &ors., AIR 1990 SC 166;
- i) Comptroller & Auditor General of India &ors. Vs. Mohan LalMehrotra&ors., AIR 1991 SC 2288;
- j) State of Madhya Pradesh Vs. G.S. Dall& Flour Mills, AIR 1991 SC 772;
- k) Naga People's Movement of Human Rights Vs. Union of India &ors., AIR 1998 SC 431;
- l) C. Rangaswamaeah&ors. Vs. Karnataka Lokavukta&ors., AIR 1998 SC 96.

Can Circular No. 123/42/2019 Dated 11/11/2019 and Circular No. 142/12/2020-GST Dated 11/10/2020 inserts a new condition-Impact of GSTR-2B

Part-4-Statutory rules create enforceable rights which cannot be taken away by issuing executive instructions

- a) Union of India Vs. Rakesh Kumar, AIR 2001 SC 1877;
- b) Swapan Kumar Pal &ors. Vs. Samitabhar Chakraborty&ors., AIR 2001 SC 2353;
- c) Khet Singh Vs. Union of India, (2002) 4 SCC 380;
- d) Laxminarayan R. Bhattad&ors. Vs. State of Maharashtra &anr., (2003) 5 SCC 413; and
- e) Delhi Development Authority Vs. Joginder S. Monga, (2004) 2 SCC 297

In Ram Ganesh TripathiVs. State of U.P., AIR 1997 SC 1446, the Hon'ble Supreme Court considered a similar controversy and held that any executive instruction/ order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed as having no force of law.

Part-5-Concluding Remarks

That the executive functions while clarifying the scope of Rule 36(4) had overridden the statutory provisions by limiting the availment of credit for a particular month only by taking into consideration details uploaded by the suppliers in the statement filed under section 37 only upto the due date of filing of GSTR-1.

Whether Rule 36(4) is ultra-vires the Statute-There has to be a Rule Making Power and a Enabling Section in the Statute for the purpose of making the Rule

CGST Amendment Act, 2018 sought to insert section 43A(4) to CGST Act, 2017 which has not yet been notified till date. The relevant extract of the same is being reproduced hereinunder:

(4) The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescribed and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent. of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section.

With insertion of Section 43A of CGST Act, a consequential amendment was brought in Section 16(2)(c) of CGST Act, 2017 wherein provision of Section 16(2)(c) were made subject to the provisions of Section 43A.

Since the amendment to section 43A couldn't be notified along with the consequential amendment to Section 16(2)(c), therefore Section 16(2)(aa) has been sought to be inserted vide Finance Act 2021.

100. In section 16 of the Central Goods and Services Tax Act, in sub-section (2), after clause (a), the following clause shall be inserted, namely:--

“(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;”.

Whether Rule 36(4) is ultra-vires the Statute-There has to be a Rule Making Power and a Enabling Section in the Statute for the purpose of making the Rule

Academy Of Nutrition Improvement ... vs Union Of India on 4 July, 2011 wherein it was held that

“Statutes delegating the power to make rules follow a standard pattern. The relevant section would first contain a provision granting the power to make rules to the delegate in general terms, by using the words “to carry out the provisions of this Act” or “to carry out the purposes of this Act”. This is usually followed by another sub-section enumerating the matters/areas in regard to which specific power is delegated by using the words “in particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters”.

No one other than the legislature can rewrite, recast or reframe the legislation because others have no power to do so. No words can be added to a statute or read words which are not there in it. Even if there is a defect or an omission in the statute, the court cannot correct the defect or supply the omission - **Union of India v. DeokiNandan Aggarwal [1992 Supp (1) SCC 323]** and **ShyamKishori Devi v. Patna Municipal Corpn. [AIR 1966 SC 1678](xxxiv).**

Can Section 164 of CGST Act, 2017 come to the rescue of Rule 36(4)

Section-164-Power of Government to make rules.—

- (1) The Government may, on the recommendations of the Council, by notification, **make rules for carrying out the provisions of this Act.**
- (2) Without prejudice to the generality of the provisions of sub-section (1), the Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provisions are to be or may be made by rules.
- (3) The power to make rules conferred by this section shall include the power to give retrospective effect to the rules or any of them from a date not earlier than the date on which the provisions of this Act come into force.
- (4) Any rules made under sub-section (1) or sub-section (2) may provide that a contravention thereof shall be liable to a penalty not exceeding ten thousand rupees.

Can Section 164 of CGST Act, 2017 come to the rescue of Rule 36(4)

M/s. P.R.Mani Electronics Vs Union of India (Madras HC) Decision dated 13th July 2020- Scope of Powers under Section 164 of CGST Act, 2017 to frame Rules

As stated earlier, the rule making power is contained in Section 164, which is couched in wide terms, and enables the Government to frame rules to give effect to the provisions of the Act and, in particular, to make rules for matters that are required to be prescribed by the CGST Act.

*By contrast, a Division Bench of the Bombay High Court interpreted Rule 117 of the CGST Rules in *Nelco Limited v. Union of India* [2020 SCC Online Bom 437] (*Nelco*) as *intra vires* Section 140 and as imposing a reasonable time limit for availing of ITC. *Nelco* was decided before Section 140 was amended. Even so, the Court concluded that Section 164 of the CGST Act is wide enough to enable the framing of rules fixing a time limit to claim Transitional ITC.*

Nevertheless, in our view, it was and continues to be traceable to Section 164, which is widely worded and imposes no fetters on rule making powers except that such rules should be for the purpose of giving effect to the provisions of the CGST Act.

Tax Deposited by the Supplier but not reflecting in GSTR-2A

-Rules are meant only for the purpose of carrying out the provisions of the Act and they cannot take away what was conferred by the Act or whittle down its effect

Insertion of Additional Condition by Rule 36(4) going beyond Section 16(2)(c)-Provisions of Section 16(2)(c) of CGST Act, 2017 provide that the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply.

The provisions of Rule 36(4) of CGST Rules, 2017 puts an additional condition wherein it has been provided that credit can only be availed by the recipient provided the supplier has furnished the details in GSTR-1 file under Section 37 of CGST Act, 2017.

That provisions of Rule 36(4) transgress the legislative intention and put an additional condition other than the one prescribed under Section 16(2)(c) and hold that the supplier should have filed the statement of outward supplies. The condition as provided under the Rule 36(4) of CGST Rules, 2017 under a subordinate legislation or delegated legislation goes beyond the scope of the parent legislation i.e. CGST/SGST Act, 2017.

Commissioners of Customs and Excise v. Cure and Deeley Ltd., (1961) 3 WLR 788 (QB) -Regulation 12 was ultra vires on three grounds. One of the grounds, which is relevant for our purpose, was that the regulation rendered the subject liable to pay such tax as the Commissioner believed to be due whereas the charging Section imposed a liability to pay such tax as in law was due.

Tax Deposited by the Supplier but not reflecting in GSTR-2A

-Rules are meant only for the purpose of carrying out the provisions of the Act and they cannot take away what was conferred by the Act or whittle down its effect

If due Tax has been paid and condition as prescribed under Section 16(2)(c) has been satisfied then whether denying credit merely because GSTR-1 has not been filed and that too by virtue of Rule 36(4) will not be violative of Article 300A since Rule 36(4) is a part of executive fiat and is not a part of law as passed by the Legislature.

Conflict between the Statute and subordinate Legislation-Union of India & Anr. Vs. M/S. Intercontinental Consultants and Technocrats Pvt. Ltd. [MARCH 07, 2018]-2018(10)GSTL 401 (SC)

It is trite that rules cannot go beyond the statute. In Babaji Kondaji Garad, this rule was enunciated in the following manner:

“Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the bye-law, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with.”

27)a rule which comes in conflict with the main enactment has to give way to the provisions of the main enactment.

28).....“the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect.”



**SECTION
16(2)(C)-WHAT
HAPPENS IF
THE SUPPLIER
DOES NOT PAYS
THE TAX**

Section 16(2)(c)-Tax to be paid by the Supplier

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply;

Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others (Delhi HC)

Therefore, *there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish bona fide purchasing dealers. The latter cannot be expected to do the impossible.* It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.

In the event that selling dealer fails to deposit the tax collected by him from the purchasing dealer, the remedy for the department would be to proceed against the selling dealer for recovery of such tax. Further, in cases where the department is satisfied that there is collusion of purchasing and selling dealer then proceeding under Section 40A of the DVAT Act can be initiated.

R.S. Infra-Transmission Ltd. V/s State of Rajasthan (Raj HC)

It was held that buying dealer cannot be defaulted for non-payment of tax by the selling dealer.

The contention of Mr. R.B. Mathur is that Rule 18 will take care of the situation. However, while considering the matter, we have to look into the matter whether the benefit envisaged under the Rajasthan VAT Act especially under sub-Section (1) shall be allowed only after verification of deposit of the tax payable by the selling dealer in the manner as notified by the Commissioner. We are in complete agreement that it will be impossible for the petitioner to prove that the selling dealer has paid tax or not as while making the payment, the invoice including tax paid or not he has to prove the same and the petitioner has already put a summary on record which clearly establish the amount which has been paid to the selling dealer including the purchase amount as well as tax amount. In that view of the matter, we are of the opinion that Rule 18 if it is accepted, then the respondents will take undue advantage and cause harassment.

M/s DY Beathel Enterprises Vs State Tax Officer-Madras HC-2021-TIOL-890-HC-MAD-GST

11. It can be seen therefrom that the assessee must have received the goods and the tax charged in respect of its supply, must have been actually paid to the Government either in cash or through utilization of input tax credit, admissible in respect of the said supply.

12. Therefore, if the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one party, either the seller or the buyer. In the case on hand, the respondent does not appear to have taken any recovery action against the seller / Charles and his wife Shanthi, on the present transactions.

13. The learned counsel for the petitioners draws my attention to the order, dated 27.10.2020, finalising the assessment of the seller by excluding the subject transactions alone. I am unable to appreciate the approach of the authorities. **When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him.**

SECTION 16 AND INTERPLAY BETWEEN ITS SUB-SECTIONS

**-VALIDITY OF TIME PERIOD
UNDER SECTION 16(4)**

**-THE INTER-PLAY BETWEEN
SECTION 16(1), 16(2) AND 16(4)**

**- WHETHER GSTR-3B WAS A
RETURN UNTIL 9TH OCTOBER
2019**

**-IMPACT OF RETROSPECTIVE
AMENDMENT**

**-TECHNICAL RESTRICTION PUT
BY GSTN FOR CLAIM OF INPUT
TAX CREDIT**



SECTION 16(1)

Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be **entitled to take credit** of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person

Section 16(2)

Notwithstanding anything contained in this section, no registered person shall be **entitled to the credit** of any input tax in respect of any supply of goods or services or both to him unless,--

Section 16(4)

(4) A registered person shall not **be entitled to take input tax credit** in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Relevant Provision of CGST Act which provides for “Entitlement of Input Tax Credit

Section	Relevant Extract of the Section “highlighting” the use of the “Term”
10(4)	Shall he be entitled to any credit of input tax
16(2)	Entitled to the credit of any input tax
67(1)(a)	Claimed input tax credit in excess of his entitlement under this act

Relevant Provision of CGST Act which provides for “Entitlement to take Input Tax Credit

Section	Relevant Extract of the Section “highlighting” the use of the “Term”
16(1)	Entitled to take credit of input tax
16(4)	Entitled to take input tax credit
Proviso to Section 16(4)	Entitled to take input tax credit
18(1)(a)	Entitled to take credit of input tax
18(1)(b)	Entitled to take credit of input tax
18(1)(c)	Entitled to take credit of input tax
18(1)(d)	Entitled to take credit of input tax
18(2)	Entitled to take input tax credit
19(2)	Entitled to take credit of input tax
19(5)	Entitled to take credit of input tax
41	Entitled to take the credit of eligible input tax

Whether entitlement and taking credit are two different things

The question now arises whether entitlement of credit and claim of credit are two different things since Section 16(2) provides that return under section 39 has to be filed for being entitled to claim the credit. It seems that entitlement and claim are two different things because for that matter a person may have filed the return for a particular month but could have forgotten to claim credit in that return which he had filed for that month. In such a case, he can take the credit till the time limit prescribed under Section 16(4) of CGST Act, 2017. Therefore, it might be possible that a person might be eligible to claim credit in the month of December 2018 as per provisions of Section 16(1) and 16(2) but he claims the credit in the month of January 2019.

Ald Automotive Pvt Ltd vs The Commercial Tax Officer And Ors .. on 12 October, 2018

The condition under which the concession and benefit is given is always to be strictly construed.

In event, it is accepted that there is no time period for claiming Input Tax Credit as contained in Section 19(11), the provision become too flexible and give rise to large number of difficulties including difficulty in verification of claim of Input Credit.

Taxing Statutes contains self-contained scheme of levy, computation and collection of tax. The time under which a return is to be filed for purpose of assessment of the tax cannot be dependent on the will of a dealer. The use of word 'shall' in Section 19(11) does not admit to any other interpretation except that the submission of Input claimed cannot be beyond the time prescribed. Section 19(11), in fact, gives additional time period for claim of Input Credit.

We, thus, are of the view that time period as provided in Section 19(11) is mandatory.

Second 16(4)-Time Limit for Claiming Input Tax Credit

Retrospective Amendment to Rule 61(5)

(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 or in FORM GSTR-2 under section 38 has been extended, the return specified in subsection (1) of section 39 shall, in such manner and subject to such conditions as the Commissioner may, by notification, specify, be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in FORM GSTR-3.

Agenda to 31st GST Council Meeting Held on 22nd December 2018

A perusal of above provisions indicate that the law permits furnishing of a return without payment of full tax as self-assessed as per the said return but the said return would be regarded as an invalid return. The said return, however, would not be used for the purposes of matching of ITC and settlement of funds. Thus, although the law permits part payment of tax but no such facility has been yet made available on the common portal. This being the case, a registered person cannot even avail his eligible ITC as he cannot furnish his return unless he is in a position to deposit his entire tax liability as self-assessed by him. This inflexibility of the system increases the interest burden.

Second 16(4)-Time Limit for Claiming Input Tax Credit

Circular No. 7/7/2017-GST –Dated 1st September 2017

Where the eligible ITC claimed by the taxpayer in FORM GSTR-3B is less than the ITC eligible as per the details furnished in FORM GSTR-2, the additional amount of ITC shall be credited to the electronic credit ledger of the registered person when he submits the return in FORM GSTR-3 (in accordance with clause (c) of sub-rule (6) of rule 61).

To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)]

**Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Indirect Taxes and Customs**

Notification No. 28/2019 – Central Tax

New Delhi, the 28th June, 2019

G.S.R.....(E). - In exercise of the powers conferred by the second proviso to sub-section (1) of section 37 read with section 168 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), the Commissioner, on the recommendations of the Council, hereby extends the time limit for furnishing the details of outward supplies in **FORM GSTR-1** of the Central Goods and Services Tax Rules, 2017, by such class of registered persons having aggregate turnover of more than 1.5 crore rupees in the preceding financial year or the current financial year, for each of the months from July, 2019 to September, 2019 till the eleventh day of the month succeeding such month.

2. The time limit for furnishing the details or return, as the case may be, under sub-section (2) of section 38 and sub-section (1) of section 39 of the said Act, for the months of July, 2019 to September, 2019 shall be subsequently notified in the Official Gazette.

[To be published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i)]

**Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Indirect Taxes and Customs**

Notification No. 46/2019 – Central Tax

New Delhi, the 9th October, 2019

G.S.R.....(E). - In exercise of the powers conferred by the second proviso to sub-section (1) of section 37 read with section 168 of the Central Goods and Services Tax Act, 2017 (12 of 2017) (hereafter in this notification referred to as the said Act), the Commissioner, on the recommendations of the Council, hereby extends the time limit for furnishing the details of outward supplies in **FORM GSTR-1** of the Central Goods and Services Tax Rules, 2017, by such class of registered persons having aggregate turnover of more than 1.5 crore rupees in the preceding financial year or the current financial year, for each of the months from October, 2019 to March, 2020 till the eleventh day of the month succeeding such month.

2. The time limit for furnishing the details or return, as the case may be, under sub-section (2) of section 38 of the said Act, for the months of October, 2019 to March, 2020 shall be subsequently notified in the Official Gazette.

**ADDITIONAL
GROUNDS FOR
CLAIM OF INPUT
TAX CREDIT IN
CASE OF GENUINE
SUPPLIES**

Additional Grounds for Claim of ITC in case of Genuine Inward Supplies & Supplier has either not deposited the tax or has not uploaded details in GSTR-1

- **Mode of Payment made for the inward Supplies**
- **Supplies covered have been received and have been used in the course or furtherance of business**
- **Assessee not being a fly by night operator and have GST and GST Returns being Filed regularly**
- **All purchase have been duly accounted for in books of accounts, all payments paid / received towards purchase of goods or receipt of services respectively have also been duly accounted.**
- **All reasonable steps were taken to ensure that suppliers of goods are not fictitious by verifying their registration details on the GSTN portal**
- **Registration certificate of supplier was valid at the time of purchase and we did not have the wherewithal to verify whether registration by the vendor has been obtained by falsification of documents**

Additional Grounds for Claim of ITC in case of Genuine Inward Supplies & Supplier has either not deposited the tax or has not uploaded details in GSTR-1

- **A taxable person who pays the price of goods or services including the amount of applicable tax to a supplier of goods or services has no means to enforce the supplier of goods or services to file his statement of outward supplies**
- **Denying ITC to a buyer of goods or services for default of the supplier of goods or services would tantamount to shifting the incidence of tax from the supplier to the buyer which is unconstitutional and against the scheme of the CGST Act/GGST Act**
- **A buyer of goods or services will have to pay GST twice on the same transaction: once at the time of purchase of the goods by paying GST to the supplier and second on disallowance of the ITC. The objective of the CGST Act/GGST Act is to charge tax only on 'value additions' and to avoid a cascading effect of taxes.**

Additional Grounds for Claim of ITC in case of Genuine Inward Supplies & Supplier has either not deposited the tax or has not uploaded details in GSTR-1

- **Denying ITC to a buyer of goods and services would tantamount to treating both the ‘guilty purchasers’ and the ‘innocent purchasers’ at par whereas they constitute two different classes. This is violative of Article 14 of the Constitution inasmuch as it treats both the ‘innocent purchasers’ and the ‘guilty purchasers’ alike. Therefore it punishes both the perpetrator of the fraud and the victim and treat both of them on an equal footing which is totally in contradiction with the mandate contained under Article 14 of the constitution, which provides that the equals are to be treated equally. **Manifest Arbitrariness and Irrational-Joseph Shine vs. Union of India AIR 2018 SC 4898; Navtej Singh Johar vs. Union of India (2018) 1 SCC 791; Hindustan Construction Company Limited & Anr. Vs Union of India & Ors. (W.P. (C) 1074/2019); Sharma Transport v. State of Andhra Pradesh (2002) 2 SCC 188; Shayara Bano and Ors. v. Union of India, AIR 2017 SC 4609.****

Additional Grounds for Claim of ITC in case of Genuine Inward Supplies & Supplier has either not deposited the tax or has not uploaded details in GSTR-1

- Denying ITC to a buyer of goods or services would tantamount to **giving the department a free hand in deciding to proceed either against buyer or the supplier or even both when it finds that the tax has not actually been deposited by the supplier with the Government.**
- Each and every registered taxable person is an **agent of the government to collect tax, deposit the same to the appropriate government treasury and buyer of goods or services is liable to pay tax to its seller at the time of purchase.** Hon'ble Supreme Court in the case of State of Punjab and others vs. Atul Fasteners Ltd. (2007) 4 SCC 471 wherein the apex court held that the selling-registered dealer who had collected tax from the purchasing-registered dealer acts as an agent for the Government.
- Denial of ITC to the buyer of goods or services for default of the supplier of goods or services, **will severely impact working capital and therefore substantially diminishes ability to continue business. Therefore, it is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution.**
- Denial of ITC to the buyer of goods or services for default of the supplier of goods or services, **is wholly unjustified and this causes the deprivation of the enjoyment of the property. Therefore, this is positively violative of the provision of Article 300A of the Constitution of India.**

Additional Grounds for Claim of ITC in case of Genuine Inward Supplies & Supplier has either not deposited the tax or has not uploaded details in GSTR-1

- Denial of ITC to the buyer of goods or services for default of the supplier of goods or services, clearly frustrates the underlying objective of removal of cascading effect of tax as stated in the Statement of object and reasons of the Constitution (One Hundred And Twenty-Second Amendment) Bill, 2014. it is an established principle of law that it is necessary to look into the mischief against which the statute is directed, other statutes in parimateria and the state of the law at the time.**
- The absence of any finding about its mala fide intention, connivance or wrongful association with the suppliers, no liability can be imposed on it on the principle of vicarious liability.**
- The process of application for registration and granting the registration thereof, the only two parties, which are involved in the proceeding, happen to be the applicant and the revenue. The documents and information, which are produced in the course of the process of granting registration, are always within the knowledge of the parties mentioned hereinabove and upon due satisfaction of all such documents and information, as furnished by the applicant, the registration certificate is being granted to an applicant and on the basis of the said certificate of registration, various parties enter into transaction with the said registered taxable person.**



**Levy of Interest under
Section 50 of CGST Act,
2017**

**-Taxpayer having Sufficient
Balance in ITC Ledger**

**-Taxpayer having
insufficient balance in ITC
Ledger**

Payment of Interest under Section 50(1) of CGST Act, 2017

Bare Provision of Section 50(1) of CGST Act, 2017

Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger

Condition-1-Person should be liable to pay tax in accordance with the provisions of CGST Act, 2017-

32nd GST Council meeting wherein scope of section 50(1) was discussed as follows:

“The Committee observed that the proposal to charge interest only on the net liability of the taxpayer, after taking into account the admissible credit, may be accepted in principle. Accordingly, the interest would be charged on the delayed payment of the amount payable through the electronic cash ledger. However, where invoices/debit notes have been uploaded in statements pertaining to the period subsequent to the period in which they should have been uploaded, the interest shall be calculated on the amount of tax calculated on the taxable value from the date on which the tax on such invoices was due. This would require amendment to the Law.”

Example-1-a person has not made any supplies during a tax period and he has availed credit of say Rs 15 Lakh. Subsequently, the department reverses the credit of Rs 2 Lakh as it was blocked credit by virtue of provisions of Section 17(5) of CGST Act, 2017. In such case, since there is no tax payable, therefore provisions of Section 50(1) would have no applicability in such cases.

Condition-2-Person who was liable to pay should have failed to pay or part thereof-

The second condition for the applicability of the provisions of sub-section (1) of section 50 is that the person who was liable to pay tax has failed to pay tax or any part thereof to the government within the period prescribed. Therefore, a person should be liable to pay tax coupled with the fact that such person should have failed in making the payment of tax or part thereof. Thus, whereas condition-1 took persons who were not required to pay tax out of the ambit of the provisions of section 50(1); condition-2 takes those persons out of the ambit of this provision who are required to pay tax but has paid tax in full.

Example-2-A person has an output liability of Rs 10 Lakh and he has availed Input Tax Credit of Rs 15 Lakh. The department subsequently finds that such person has availed Input Tax Credit of Rs 2 Lakh which was blocked by virtue of provisions of Section 17(5). Now in the given case, since the assessee has paid the entire tax of Rs 10 Lakh out of the eligible credit and Rs 2 Lakh which have been reversed are out of the Input Tax Credit which was although availed but was not utilized, therefore provisions of Section 50(1) would not be applicable in the instant cases since there is no unpaid or partly paid tax left.

Example-3-Twisting the same example as given above wherein Input Tax Credit of Rs 15 Lakh has been availed against an output liability of Rs 10 Lakh. The department subsequently finds that such person has availed Input Tax Credit of Rs 7 Lakh which was blocked by virtue of provisions of Section 17(5). Now in the given case, there would be a short-paid liability of Rs 2 Lakh and thus, interest would be applicable on the tax which is short paid i.e. Rs 2 Lakh and not the entire reversal of Rs 7 Lakh.

Condition-3-The third condition is that interest shall be payable for the period for which the tax or any part thereof remains unpaid at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

Argument-1-Provisions of Section 42 are applicable only incases for matching, reversal and reclaim of Credit and are based on details of inward supply filed by the registered person

Argument-2-Details of Inward Supply in GSTR-2 were required to be filed under Section 38 of CGST Act, 2017

Argument-3-That the time limit for furnishing GSTR-2 in Section 38 has not been notified till date

Argument-4-Rule 69 of CGST Rules provide that matching under Section 42 of CGST Act, 2017 of Details of Inward Supply should be extended if the due date of filing of GSTR-2 under section 38 has been extended

Argument-5-That provisions of Section 50(3) are not applicable in cases where excess credit has been claimed inadvertently but it is applicable on the credit once reversed but reclaimed in contravention of the procedure as mentioned in Section 42(7)

Argument-6-The mechanism as envisaged been in place contravention to provisions of Section 42 would not have occurred since the system itself would have blocked availment of excess credit inadvertently and since the mechanism itself is not in place, therefore there can be no non-compliance of provision of Section 42

Argument-7-Since the process as envisaged in Section 42 has not been brought in place, therefore the procedure relating to reflection of the input reversed in Output Liability and being debited to Electronic Credit ledger too has not been brought in place.

An aerial, high-angle photograph of a dense urban skyline, likely New York City, showing numerous skyscrapers and buildings. A semi-transparent circular graphic with a white outline is overlaid on the left side of the image. The text 'IMMOVABLE PROPERTY' is centered within this circle in a bold, white, sans-serif font.

IMMOVABLE PROPERTY

INPUT TAX CREDIT : CA ARPIT HALDIA

Section 17(5)(c) & (d)-Blocked ITC regarding Immovable Property

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

- c) **Works contract services** when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
- d) **Goods or services or both received by a taxable person for construction of an immovable property** (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes reconstruction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

Explanation.— For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means **apparatus, equipment, and machinery fixed to earth by foundation or structural support** that are **used for making outward supply of goods or services or both** and includes **such foundation and structural supports** but excludes—

- (i) **land, building or any other civil structures;**
- (ii) **telecommunication towers; and**
- (iii) **pipelines laid outside the factory premises.**





FAQ-16-What is the scope of the term Capitalisation in Explanation to Section 17(5)(c) & (d)

Explanation to the sub-section (5) has defined the term 'Construction' to encompass all the activities '... to the extent of capitalization to the said immovable property.' Mere statement that expenditure is not capitalized cannot come to the rescue of Applicant. **Be that as it may, the eligibility of ITC does not depend on the treatment given to the expenditure. If the expenditure is revenue in nature but subsequently capitalized in the books of account it would not make Applicant eligible to ITC on such goods.-** Jabalpur Entertainment Complex Private Limited (2018) 97 taxmann.com 587- AAR Madhya Pradesh

Immovable Property - Bench Mark Adopted in GST

- a) **CBEC Circular Number 58/1/2002-CX, dated 15/1/2002** where in para (e) it has been clarified that

If items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as movable and will, therefore, not be excisable goods.

- b) **Definition of Immovable Property in Clause 3(26) of General Clauses Act, 1887**

“Immovable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

- c) **Definition of “attached to earth” in Section 3 of Transfer of Property Act, 1882**

The term “attached to the earth” means

- ✓ rooted in the earth, as in the case of trees and shrubs,
- ✓ embedded in the earth, as in the case of walls or buildings, and
- ✓ attached to what is so embedded for permanent beneficial enjoyment of that to which it is attached.



Immovable Property- Supreme Court Decision



Commnr. Of Central Excise, .. vs Solid & Correct Engg. Works & Ors on 8 April, 2010

Attachment of the plant in question with the help of nuts and bolts to a foundation not more than 1= feet deep intended to provide stability to the working of the plant and prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above.

Takeaway-1-Attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth.

Takeaway-2-It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition.

Takeaway-3-Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation.

Takeaway-4-So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.

The courts in this country have applied the test whether the annexation is with the object of permanent beneficial enjoyment of the land or building. Machinery for metal-shaping and electro-plating which was attached by bolts to special concrete bases and could not be easily removed, was not treated to be a part of structure or the soil beneath it, as the attachment was not for more beneficial enjoyment of either the soil or concrete.

Takeaway-5-Attachment in order to qualify the expression attached to the earth, must be for the beneficial attachment of that to which it is attached. Doors, windows and shutters of a house are attached to the house, which is imbedded in the earth. They are attached to the house which is imbedded in the earth for the beneficial enjoyment of the house. They have no separate existence from the house. Articles attached that do not form part of the house such as window blinds, and sashes, and ornamental articles such as glasses and tapestry fixed by tenant, are not affixtures.

It is noteworthy that in none of the cases relied upon by the assessee referred to above was there any element of installation of the machine for a given period of time as is the position in the instant case.

Commnr. Of Central Excise, .. vs Solid & Correct Engg. Works & Ors on 8 April, 2010

The machines in question were by their very nature intended to be fixed permanently to the structures which were embedded in the earth. The structures were also custom made for the fixing of such machines without which the same could not become functional. The machines thus becoming a part and parcel of the structures in which they were fitted were no longer moveable goods. It was in those peculiar circumstances that the installation and erection of machines at site were held to be by this Court, to be immovable property that ceased to remain moveable or marketable as they were at the time of their purchase.

Once such a machine is fixed, embedded or assimilated in a permanent structure, the movable character of the machine becomes extinct. The same cannot thereafter be treated as moveable so as to be dutiable under the Excise Act. **But cases in which there is no assimilation of the machine with the structure permanently, would stand on a different footing. In the instant case all that has been said by the assessee is that the machine is fixed by nuts and bolts to a foundation not because the intention was to permanently attach it to the earth but because a foundation was necessary to provide a wobble free operation to the machine. An attachment of this kind without the necessary intent of making the same permanent cannot, in our opinion, constitute permanent fixing, embedding or attachment in the sense that would make the machine a part and parcel of the earth permanently. In that view of the matter we see no difficulty in holding that the plants in question were not immovable property so as to be immune from the levy of excise duty.**

Triveni Engineering & Industries vs Commissioner Of Central Excise-

Something required to be dismantled before being removed will be treated as immovable and fails its test of marketability

Whether an article is permanently fastened to anything attached to the earth require determination of both the intention as well as the factum of fastening to anything attached to the earth. And this has to be ascertained from the facts and circumstances of each case. In our view, the findings recorded do not justify the conclusion of the Tribunal inasmuch as on removal a turbo alternator gets dismantled into its components steam turbine and alternator. **It appears that the Tribunal did not keep in mind the distinction between a turbo alternator and its components. Thus, in our view, the test of permanency fails. The marketability test requires that the goods as such should be in a position to be taken to the market and sold and from the above findings it follows that to take it to the market the turbo alternator has to be separated into its components -- turbine and the other alternator -- but then it would not remain turbo alternator, therefore, the test is incorrectly applied.**

Municipal Corporation of Greater Bombay & Ors. Vs. Indian Oil Corporation Ltd. (1991
Suppl. (2) SCC 18)

Petrol tank resting on earth on its own weight will be treated immovable property?

One of the questions considered by the Court was whether a petrol tank, resting on earth on its own weight without being fixed with nuts and bolts, had been erected permanently without being shifted from place to place. **It was pointed out that the test was one of permanency; if the chattel was movable to another place of use in the same position or liable to be dismantled and re-erected at the later place, if the answer to the former is in the positive it must be a movable property but if the answer to the latter part is in the positive then it would be treated as permanently attached to the earth.**

Something embedded to the earth will be treated as immovable property as it is not transportable or transferable nor it could be sold?

While re-stating the test, namely, first the article must be goods and secondly that it should be marketable or capable of being brought to market, **it was held that goods which are attached to the earth and thus become immovable did not satisfy the test of being goods within the meaning of the Central Excise Act nor can be said to be capable of being brought to the market for being sold. In that case, it was found that both the tests were not satisfied and, therefore, the tube mill and welding head erected by the appellant were not exigible to excise duty.**

Mittal Engineering Works (P) Ltd. vs. Collector of Central Excise, Meerut (1997 (1) SCC 203)

Machinery not capable of being sold as it is will be treated as immovable

Court pointed out that the mono vertical crystalliser, had to be assembled, erected and attached to the earth by a foundation at the site of the sugar factory and it was not capable of being sold as it is, without anything more. The erection and installation of a plant is not excisable and to so hold would, impermissibly, bring into the net of excise duty all manner of plants and installations.

T.T.G. Industries Ltd. V. CCE, Raipur 2004 (167) ELT 501 (SC)

Relevance of Weight, volume and process involved in erection and installation

The machinery was erected at the site by the assessee on a specially made concrete platform at a level of 25 ft. height. Considering the weight and volume of the machine and the processes involved in its erection and installation, this Court held that the same was immovable property which could not be shifted without dismantling the same.

Sirpur Paper Mills Ltd. vs. Collector of Central Excise, Hyderabad (1998 (1) SCC 400)

Machinery attached to earth to prevent wobble and to secure maximum operational efficiency will not be treated as immovable

CEGAT recorded finding that whole purpose behind attaching machine to a concrete base was to prevent wobbling of machine and to secure maximum operational efficiency and also for safety. Supreme Court held that in view of those findings it was not possible to hold that the machinery assembled and erected by the appellant at its factory site was immovable property as something attached to earth like a building or a tree. The test, it was noted, would be whether paper-making machine could be sold in market and as Tribunal had found as a fact that it could be sold, so machine was held to be not a part immovable property of the company. It appears of that the aforementioned two cases -- Mittal Engineering Works (P) Ltd. and Quality Steel Tubes (P) Ltd. (supra), -- were not referred to in Sirpur Paper Mills Ltd.s case

How does the length of time works to decide about the immovable nature of the property

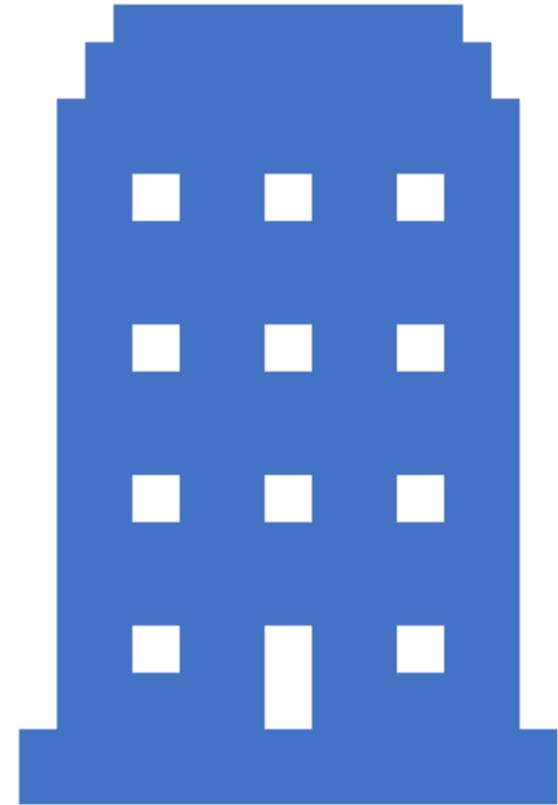
On Mobile Towers by Karnataka High Court, which differed with the view of Bombay High Court's judgment in Hutchison Max Telecom P Ltd [(2008) 224 ELT 191 (Bom)]. **However mobile towers are standalone entities erected usually on roof-tops after an agreement with the owner of the building for using the space for a limited period of time, subject to periodic renewals. On the other hand, the Tower Package involves the erection of a series of towers on acquired land for use in perpetuity.** In contrast to the time-bound nature of the agreements for using building spaces for erecting mobile towers, the **Tower Package is not being constructed with the contemplation of such relocation.** The judgment of Karnataka High Court in the matter of Essar Telecom Infrastructure P. Ltd. (supra) is, therefore, not applicable in the present context.

S/S Triveni N L Ltd [RN - 910, 911 & 912 of 2001 (All)] Allahabad High Court

12. The term "permanently fastened or attached to earth" has to be read in the context for the reason that nothing can be fastened to earth permanently so that it can never be removed.

Immovable Property

- AAR Decision



-
- ❖ **Whether ITC is available of the Warehouse constructed using Pre-Fabricated Technology?** Tewari Warehousing Co. (P.) Ltd., In re [2019] 102 taxmann.com 295/72 GST 485 (AAR - West Bengal) - ITC not eligible.
 - ❖ **Whether Erection of Mobile Towers would be treated as immovable property?** - Vindhya Telelinks Ltd., In re [2018] 97 taxmann.com 564 (AAR- UTTARAKHAND)
 - ❖ **Transmission Towers erected with no intention to be removed in near future?** Skipper Ltd [2018] 100 taxmann.com 90 (AAR-WEST BENGAL)
 - ❖ **Whether ITC on construction of Sheds will be allowed?** Maruti Ispat and Energy (P.) Ltd., In re [2018] 99 taxmann.com 103 [2019] 72 GST 125 (AAR - Andhra Pradesh)
 - ❖ **Whether ITC will be allowed for lease rent paid for pre-operative period ?** GGL Hotel and Resort Company Ltd. (AAAR - West Bengal)
 - ❖ **Whether ITC is allowable for cases wherein immovable property will be rented out?** Indag Rubber Ltd., In re [2020] 115 taxmann.com 215 (AAR- RAJASTHAN)

- ❖ **Whether ITC will be allowed for Installation of Lifts?** Las Palmas Co-operative Housing Society Ltd. [2020] 114 taxmann.com 233 (AAR - MAHARASHTRA)
- ❖ **Whether ITC is available on Lift, Escalators, Water treatment Plant, Sewage Treatment Plant, D. G. Sets, Transformers, Fire fighting and water management pump system etc. procured for construction of Shopping Mall.** Tarun Realtors (P.) Ltd [2020] 116 taxmann.com 201 (AAAR-KARNATAKA)
- ❖ **Whether ITC is available on detachable sliding and stackable glass partitions?** M/s Wework India Management Private Limited [TS-292-AAAR-2020-NT]
- ❖ **Whether applicant is eligible to claim input tax credit of GST paid on input & input services used for construction of commercial immovable property, subsequently used for renting?** Ashish Arvind Hansoti [2020] 117 taxmann.com 513 (AAR - MAHARASHTRA)
- ❖ **The Implications of “Foundation and Structural Support” and “Land and Building” separately in the definition of “Plant and Machinery”.** Jabalpur Hotels (P.) Ltd. [2020] 118 taxmann.com 42 (AAR - MADHYA PRADESH)

1. **Eligibility of ITC in case of Input Tax paid on Purchase of Water Slides- Eligible-Water Slides shall fall within the meaning of the term apparatus, equipment and machinery and therefore, shall be eligible for claim of ITC.**
2. **Steel and Civil Structure on which the Water Slides are installed-Eligible-Foundation and support structures which are used to fasten plant and/or machinery to the Earth is classifiable as 'Plant and/or Machinery'. AAR observed that slides are fastened to the Steel and Civil Structure are affixed to the Earth through these Steel and Civil Structures. Therefore, these Steel and Civil Structures shall form part of the Plant and Machinery. Accordingly, the credit of Tax paid on Input goods and services used in construction of this support structure shall be available.**
3. **Machines installed for Wave Pool-Eligible-The foundation for these machines are eligible to be part of the Machines and the ITC shall be treated in a manner similar to that of the Machines.**
4. **Machine Room for Machines installed for wave pool-Not Eligible- Machine Room, which is a civil structure, erected for protecting machine is neither foundation nor civil structure for machine therefore, ITC relatable to the construction of the room for Housing the machine shall not be eligible for ITC.**

5. **Input Tax Credit on Goods and Services used for construction of swimming pools/Wave Pool in which the water slides directly run into- Not Eligible-Swimming Pools/Wave Pools are not support structure or foundation for a plant, but are independent items per se. Since they are not foundation or support structure on which slides are fasted for affixing them to earth and also on account they being Civil Structures, they are therefore excluded from the meaning of 'plant and machinery'. Thus, the ITC related to the construction of the Swimming Pools and Wave Pools, subject to its capitalization shall not be available.**
6. **Provision of facilities like transformers, sewage treatment plant, Electrical Wiring and Fixtures. Surveillance systems, D.G. Sets, Lifts, Air Handling Units etc.- These are sine qua non for a commercial mall and hence cannot be considered separate from the building or civil structure. The provision of these are either statutory for a building or defines the nature of the building as a commercial mall. Hence the input tax credit on the inward supplies of goods or services involved in the construction of immovable property which is a civil structure or building is not available to the applicant and hence blocked.**

-
- ❖ **Whether ITC is available in respect of development of Smart Industrial Port City? Deendayal Port Trust [2020] 117 taxmann.com 639 (AAR - GUJARAT)**
 - ❖ **Whether ITC is to be reversed on pro rata basis for plots sold after issuance of completion certificates? PPD Living Spaces (P.) Ltd [2018] 98 taxmann.com 158 (AAR - KERALA)**
 - ❖ **Whether ITC is available in respect of paver blocks fastened on earth ? Sundharams (P.) Ltd. [2020] 118 taxmann.com 12 (AAR - MAHARASHTRA)**
 - ❖ **Whether ITC is available for inputs and services procured for construction of Hall being rented on Rent? Sree Varalakshmi Mahaal LLP, [2020] 113 taxmann.com 56 (AAR - TAMILNADU)**
 - ❖ **Whether ITC is available in respect of capitalizing portion of the building as an immovable property? Teamview Developers LLP, [2019] 110 taxmann.com 440 (AAR - KARNATAKA)**
 - ❖ **Whether ITC is available in respect of GST paid on goods purchased for the purpose of construction & maintenance of Warehouse? Unity Traders, [2020] 115 taxmann.com 147 (AAR - MADHYA PRADESH)**

As per Explanation to the Section 17 of CGST Act, 2017 credit is not available in respect of land, building or any other civil structure..... Therefore, in view of the aforesaid provisions of law, Cenvat Credit of GST paid in relation with building or any other civil structure is not available and since sanitary fittings are integral part of building or any other civil structure, cenvat credit of GST paid on such sanitary fittings is not available. However, credit of GST is available on office fixtures & furniture, AC plant. To further strengthen the view, the authority rely on the CBIC Board Circular No. 943/04/2011-CX dated 29th April 2011 wherein it was clarified that the goods such as furniture and stationery used in an office within the factory are goods used in the factory and are used in relation to the manufacturing business and hence the credit of the same is allowed. Further the Hon'ble CESTAT, Principal Bench, New Delhi in the case of M/s Balkrishna Industries Ltd v. CCE, Jaipur-I vide its Final Order No. A/53217-53218/2015 dated 09.10.2015 reported in 2016 (335) ELT 559 (Tri-Del) has held that the credit on duty paid on air-conditioners installed in the office of factory is admissible. Therefore the credit of input tax charged on the supply of fixtures & furniture and AC plant is admissible under CGST/SGST Act. 2017, provided that the registered person has not claimed depreciation on the tax component of the cost of the capital goods and plant and machinery under the provisions of the Income-tax Act 1961.



Thank You

CA DR ARPIT HALDIA

www.gst-online.com