



@ Rajkot Branch of WIRC of ICAI

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Intricacies in ITC

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**Matching of ITC and
Related Litigation**

**Other Important issues in
ITC**

Interest on ITC Reversal

Recent Caselaws

STATEMENT OF OBJECTS AND REASONS

The Constitution (122nd Amendment) Bill, 2014

- ❑ The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.



Matching of ITC and Related Litigation

Matching of ITC – History so far

Expectation of perfect world without any errors by taxpayers (not permitting revision)

Provisions for entry to entry matching and expectation of robust portal

Entire matching mechanism incorporated in the Act itself

Corrections in piecemeal manner

Inconsistent approach by Government

Making Rules and Notifications driving force without backing of the Act

Matching of ITC

**Before Rule
36(4) inserted**

Period Covered :
01.07.2017 to
08.10.2019

**After Rule 36(4)
but prior to
Section
16(2)(aa)**

Period Covered :
09.10.2019 to
31.12.2021

**Rule 36(4) and
Section
16(2)(aa) in
existence**

Period Covered :
01.01.2022 onwards

**Sec 16(2)(ba)
inserted and
Sec 38
amended**

Period Covered :
01.10.2022 onwards

Important Sections

- ❑ **Section 16 – Eligibility and Conditions for taking input tax credit**
- ❑ **Section 38 – Furnishing Details of inward Supplies / Communication of details of inward supplies and input tax credit**
- ❑ **Section 39 – Furnishing of Returns**
- ❑ **Section 41 – Claim of Input Tax Credit and Provisional acceptance thereof / Availment of input tax credit**
- ❑ **Section 42 – Matching, Reversal and Reclaim of Input Tax Credit / omitted**

Important Rules

- ☐ **Rule 60 – Form and Manner of ascertaining details of inward supplies. (prior to 1.1.21 – 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 69, 70 & 71 omitted w.e.f. 1.10.22)**

Matching of ITC – Statutory Provisions

❑ Section 41 (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

❑ Amended w.e.f. 1.10.22

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

(2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest, by the said person in such manner as may be prescribed:

Provided that where the said supplier makes payment of the tax payable in respect of the aforesaid supplies, the said registered person may re-avail the amount of credit reversed by him in such manner as may be prescribed.]

Matching of ITC – Statutory Provisions

- ❑ Section 42 (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—
(omitted w.e.f. 1.10.22)
- ❑ Section 38 provides for furnishing of details of inward supply in form GSTR 2
- ❑ The time limit for furnishing GSTR 2 u/s 38 is not notified yet
- ❑ The notification no 44/2018 dated 10.09.2018 provides that – *‘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, 2017 to March, 2019 shall be subsequently notified in the Official Gazette’*

Matching of ITC – Statutory Provisions

❑ Rule 69(1) 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:

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:

Matching of ITC – Statutory Provisions

- ❑ Section 38(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:
- ❑ Provided that no rectification of error or omission in respect of the details furnished under sub-section (2) shall be allowed after furnishing of the return under section 39 for the month of September following the end of the financial year to which such details pertain, or furnishing of the relevant annual return, whichever is earlier.

Points to Ponder

- ❑ Section 42 is applicable only in case of details of inward supply is furnished by registered person.
- ❑ Such detail are required to be submitted in form GSTR 2 u/s. 38
- ❑ The due date for return u/s. 38 is still not notified.
- ❑ Section 38(5) also provides for payment of tax , interest on non matching of ITC u/s 42.
- ❑ Rule 69 provides that matching u/s 42 should be done after due date for furnishing of GSTR 3 return.
- ❑ Rule 69 also provides that when the date for GSTR 2 is extended, the date for matching u/s. 42 also stands to be extended.
- ❑ As the GSTR 2 return is not filed till date and date for the same is extended, the date for matching also stands extended.

Points to Ponder

- ❑ Section 42 is entire code in itself. It provides for procedure and mechanism for ITC matching. Once such system is not in place, there can not be non-compliance of such section.
- ❑ Can SCN can be issued against provisional claim?

Press Release

❑ *Press release dated 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.*

Section 16(2)(c)

- ❑ (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;
- ❑ Conditions in Section 16(2)(c) is also subject to Section 41
- ❑ Arise India Limited and Other Vs. Commissioner of Trade and Taxes, Delhi and Others

[TS-314-HC-2017(Del)-VAT]

41. The Court respectfully concurs with the above analysis and holds that in the present case, the purchasing dealer is being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealer and therefore avoid transacting with such selling dealers. Alternatively, what Section 9(2)(g) of the DVAT Act requires the purchasing dealer to do is that after transacting with the selling dealer, somehow ensure that the selling dealer does in fact deposit the tax collected from the purchasing dealer and if the selling dealer failed to do so, undergo the risk of being denied ITC. Indeed section 9(2)(g) of the DVAT Act places an onerous burden on a bonafide purchasing dealer.

Section 16(2)(c)

❑ D.Y. Beathel Enterprises Vs. State Tax Officer (Data Cell) – Madras High Court – 24.02.2021

15. According to the respondent, there was no movement of the goods. Hence, examination of Charles and his wife has become all the more necessary and When the petitioners have insisted on this, I do not understand as to why the respondent did not ensure the presence of Charles and his wife Shanthi, in the enquiry. Thus, the impugned orders suffers from certain fundamental flaws. It has to be quashed for more reasons than one.

a) Non-examination of Charles in the enquiry

b) Non-initiation of recovery action against Charles in the first place

16. Therefore, the impugned orders are quashed and the matters are remitted back to the file of the respondent. The stage upto the reception of reply from the petitioners herein will hold good. Enquiry alone will have to be held afresh. In the said enquiry, Charles and his wife Shanthi will have to be examined as witnesses. Parallely, the respondent will also initiate recovery action against Charles and his wife Shanthi.

Section 16(2)(c)

❑ RS Infra Transmission Limited Vs. State of Rajasthan (DB CWP No. 12445/ 2016)

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 in to 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 to take undue advantage and cause harassment.

Section 16(2)(c) – Doctrine of Impossibility

- ❑ The legal maxim, *lex non cogit ad impossibilia*, comes into play that postulates that law cannot compel a man to do that which cannot possibly be performed.

Commissioner Of Income Tax vs M/S. Cello Plaston 2012 (Bom HC)

The statute 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.

The Inter College vs The State Of U.P. 2006(All 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-

Matching of ITC after 09.10.2019

- ❑ Rule 36(4) has been inserted w.e.f. 09.10.2019 and amended from time to time
- ❑ (4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under subsection (1) of section 37 unless,- (a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility; and (b) the details of such invoices or debit notes have been communicated to the registered person in FORM GSTR-2B under subrule (7) of rule 60.
- ❑ Rule prior to 1.1.22 - (4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been furnished by the suppliers under sub-section (1) of section 37, in FORMGSTR-1 or using the invoice furnishing facility shall not exceed 5 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been furnished by the suppliers under sub-section (1) of section 37 in FORMGSTR-1 or using the invoice furnishing facility.

Points to Ponder

- ❑ Is rule 36(4) ultravires?
 - ❑ Section 16(2)(c) was made subject to Section 43A but the same was not notified
 - ❑ Section 16(2) (aa) has been inserted by Finance Act, 2021 to provide legal backing to rule 36(4) but its effective from 1.1.22 only.
 - ❑ Can Section 164 authorize rule 36(4)
- Section 164 (1) - The Government may, on the recommendations of the Council, by notification, *make rules for carrying out the provisions of this Act.*
- ❑ *Rule 36(4) can not put additional conditions other than section 16(2)(c)*

Matching of ITC after 01.01.2022

- ❑ Section 16(2)(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;

Matching of ITC after 01.10.2022

Section 16(2)(ba) has been inserted.

Section 16(2)(ba) - the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;]

Section 38 has been substituted

Section 38. Communication of details of inward supplies and input tax credit

(1) The details of outward supplies furnished by the registered persons under subsection (1) of section 37 and of such other supplies as may be prescribed, and an autogenerated statement containing the details of input tax credit shall be made available electronically to the recipients of such supplies in such form and manner, within such time, and subject to such conditions and restrictions as may be prescribed.

(2) The auto-generated statement under sub-section (1) shall consist of -

- (a) details of inward supplies in respect of which credit of input tax may be available to the recipient; and

Matching of ITC after 01.10.2022

(b) details of supplies in respect of which such credit cannot be availed, whether wholly or partly, by the recipient, on account of the details of the said supplies being furnished under sub-section (1) of section 37 -

- (i) by any registered person within such period of taking registration as may be prescribed; or
- (ii) by any registered person, who has defaulted in payment of tax and where such default has continued for such period as may be prescribed; or
- (iii) by any registered person, the output tax payable by whom in accordance with the statement of outward supplies furnished by him under the said sub-section during such period, as may be prescribed, exceeds the output tax paid by him during the said period by such limit as may be prescribed; or
- (iv) by any registered person who, during such period as may be prescribed, has availed credit of input tax of an amount that exceeds the credit that can be availed by him in accordance with clause (a), by such limit as may be prescribed; or
- (v) by any registered person, who has defaulted in discharging his tax liability in accordance with the provisions of sub-section (12) of section 49 subject to such conditions and restrictions as may be prescribed; or
- (vi) by such other class of persons as may be prescribed.]

Matching of ITC after 01.10.2022

Section 41 has been amended

Section 42, 43 and 43A have been omitted.

Rule 69, 70 and 71 have been omitted

Notices for Mismatch – Suggested Grounds for Reply

- ❑ To check under which section, the notice has been issued. Notice for mis match in case of genuine purchases can not be issued u/s. 74.
- ❑ The SCN failed to mention the reason for proposed demand except the mismatch of ITC. It is very settled legal principle that SCN should be specific and accurate.
- ❑ The SCN has failed to provide ITC pertains to which supplier, How conditions of section 16 are not fulfilled etc.
- ❑ The supplier was holding valid registration at the time of supply. The said registration has been granted by government and buyer has no role in it.
- ❑ Reasonable verification of supplier's profile has been done.
- ❑ Goods or Services received are actually used in the course or furtherance of business.
- ❑ Payments have been made and the same is through proper banking channel.
- ❑ All purchases are duly accounted for in books of accounts.

Notices for Mismatch – Suggested Grounds for Reply

- ❑ After payment to supplier, the assessee does not have any means to check the payment of taxes by the supplier.
- ❑ Assessee has been regular in filing of GST returns and payment of taxes.
- ❑ The supplier acts as agent of government in collecting tax and the buyer has duly paid tax to the agent of the government.
- ❑ Disallowance of ITC would result in shifting of tax liability from supplier to buyer.
- ❑ Disallowance of ITC would give power to department to decide whether to punish supplier or buyer, which is against the spirit of the law.
- ❑ Disallowance of ITC would result in double taxation on buyer, at the time of purchase and at the time of disallowance of ITC.
- ❑ If the department recovers the tax from supplier as well as the buyer, it would result in unjust enrichment to the government.

Notices for Mismatch – Suggested Grounds for Reply

- ❑ Unless and until the malafide association of buyer with supplier is proved, no demand can be raised from the buyer.
- ❑ Disallowance of ITC in each and every case would result in treating the genuine purchaser and fraudulent purchaser at the par.
- ❑ It is also submitted that ITC is substantive right granted to the tax payer under the provisions of the GST Act as well as Constitution of India. It is well established legal principle that such substantive right can not be denied on basis of procedural lapses.
- ❑ The mis-match may be on account of inadvertent reporting by supplier in GSTR 1. However, the mechanism for rectification of GSTR 1 through GSTR 1A or GSTR 2A were not in existence and such inadvertent reporting cannot be rectified.

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

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

Council And Ors. (Madras High Court)

Notices for Mismatch – Suggested Grounds for Reply

- ❑ If SCN issued without identifying the party or transactions for difference in ITC – The allegations of non compliance of section 16 can not be proved. SCN not legally sustainable and to be quashed.
- ❑ If SCN issued for specific party – The facts of transactions with the said party need to be established. Whether any action taken against such supplier or not?
- ❑ If SCN has been issued on account of abinitio cancellation of registration. – The registration was valid and active at the time of transactions need to be established. The reasonable care has been taken.

Notices for Mismatch – Suggested Grounds for Reply

- ❑ LGW Industries Ltd. v. Union of India (Calcutta High Court)
- ❑ Input tax credit - Suppliers alleged to be fake and non-existent - Department contended that genuineness of suppliers was not verified by petitioners before entering into transactions - On other hand, petitioners contended that genuineness of suppliers was verified and that all transactions entered into were before cancellation of their registrations and therefore, impugned transactions were valid - HELD : Issue of entitlement to input tax credit was to be considered afresh - Payments along with tax actually paid to suppliers were to be verified - It was also to be verified as to whether transactions were made before cancellation of registration of suppliers - Benefit of ITC would be granted if purchases were genuine and purchases were supported by documents

Circular 183/15/2022 – 27.12.22

(For 1.7.17 to 8.10.19)

- ❑ Clarification for reconciling the mismatch in ITC for FY 2017-18 and 2018-19.
- ❑ The difference may be due to various reasons like non reporting in GSTR 2, Reporting as B2C in GSTR 1, Reporting on wrong GSTIN in GSTR 1 etc.
- ❑ Conditions of possession of invoice, receipt of goods / services and payment to supplier to be fulfilled.
- ❑ If difference with respect to single supplier is more than 5 lacs then certificate from CA / CMA about discharging liability by supplier need to be obtained.
- ❑ If difference with respect to single supplier is less than 5 lacs then certificate from supplier about discharging liability by supplier need to be obtained.

Circular 193/05/2023 – 17.7.23

(For 9.10.19 to 31.12.21)

- ❑ Clarification for reconciling the mismatch after insertion of rule 36(4).
- ❑ The difference above the limit specified in rule 36(4) will not be available.
- ❑ The difference within the limit of rule 36(4) will be available subject to production of certificate as per circular 183/15/2022.

Other Important Issues in ITC

Proviso to Section 16(2) & Rule 37

- ❑ Proviso to Section 16(2)
- ❑ Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be ~~added to his output tax liability~~, along with interest thereon, in such manner as may be prescribed:
- ❑ Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

Proviso to Section 16(2) & Rule 37

❑ Rule 37 (1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16 , shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in FORM GSTR-2 for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice:

(Amended w.e.f. 1.10.22)

❑ Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16 :

Proviso to Section 16(2) & Rule 37

- ❑ Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16 .
- ❑ (2) The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.
- ❑ Whether rule is valid?
- ❑ Whether interest is payable?

Section 16(4) – Time limit for taking ITC

- ❑ 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 debit note pertains or furnishing of the relevant annual return, whichever is earlier.
- ❑ Whether applicable to credit on import of goods?
- ❑ Whether applicable to credit on RCM ?

Points to Ponder

- ❑ Section 16(2) starts with non-obstante clause to entire section 16.
- ❑ Section 16(2) provides that person can not claim the ITC till the return u/s 39 is not furnished.
- ❑ Section 39 does not provide to file return along with payment of taxes but the GST portal does not allow the same.
- ❑ The section 16(4) could not be complied with due to restrictions on GST portal.
- ❑ Section 16(4) is in conflict with the section 16(1) and section 16(2).
- ❑ Section 39(7) provides that registered person should pay tax after considering all details including inwards suppliers and ITC. The said section nowhere provides for payment of entire output liability in case of delayed return.

Points to Ponder

- ❑ The Act allows to file delayed return with payment of interest and late fees. The ITC can not be restricted in delayed returns.

Mr Rashmikant Kundalia vs Union of India W.P 771 of 2014 (Bom.),

In other words, the late filing of the TDS return/statements is regularised upon payment of the fee as set out in section 234E. This is nothing but a privilege and a special service to the deductor allowing him to file the TDS return/statements beyond the time prescribed by the Act and/or the Rules.

- ❑ The purpose of section 16(4) should be read as that if any taxpayer has missed to claim any ITC for previous financial year, then he is entitled to claim the same ITC before the due date of the return for September month of the succeeding fiscal year. It does not bar the claim of ITC by the way of delayed returns if the claim of credit is being made in the respective months and merely there is delay in filing of the returns.

Gobinda Construction v. UOI [2023] 154 taxmann.com 311 (Patna)

- ❑ Input tax credit - Sub-section (4) of section 16 - **Constitutional validity** - Language of section 16 of CGST/BGST Act suffers from no ambiguity and clearly stipulates grant of ITC subject to conditions and restrictions put thereunder - Sub-section (4) of section 16 in no unambiguous terms, provides that a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after 30th day of November (post amendment), following end of financial year to which such invoices or debit notes pertain or furnishing of relevant annual return, whichever is earlier - In order to invoke article 300-A of Constitution by a person, two circumstances must jointly exist viz., (i) deprivation of property of a person and (ii) lack of sanction of law - Provision under sub-section (4) of section 16 is one of conditions which makes a registered person entitled to take ITC and by no means it can be said to be violative of article 300-A of Constitution of India - Further fiscal legislation having uniform application to all registered persons, cannot be said to be violative of article 19(1)(g) of Constitution and question of such statutory provision being violative of article 302 of Constitution and article 13 of Constitution does not arise at all - Thus, sub-section (4) of section 16 of CGST/BGST Act is constitutionally valid and not violative of articles 19(1)(g) and article 300-A of Constitution of India

Section 17(5) – Motor Vehicles

- ❑ (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:—
 - ❑ (a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—
 - (A) further supply of such motor vehicles; or
 - (B) transportation of passengers; or
 - (C) imparting training on driving such motor vehicles;
- ❑ Point to Ponder
 - Vehicle Registration v/s Use
 - Scope of further supply

Section 17(5) – Immovable Property

- ❑ (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 re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

Section 17(5) – 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.

Section 17(5) – Immovable Property

❑ Safari Retreats Private Limited vs. Chief Commissioner of CGST [2019 (25) GSTL 341 (Ori.)]

19. The very purpose of the Act is to make the uniform provision for levy collection of tax, intra-State supply of goods and services both Central or State and to prevent multi taxation.

Therefore, the contention which has been raised by the Learned Counsel for the petitioners keeping in mind the provisions of Section 16(1)(2) where restriction has been put forward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation put forward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate, he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST, to which he is not liable.

20. In that view of the matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in (1999) 2 SCC 361= [1999 \(106\) E.L.T. 3](#) (S.C.) (supra), the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.

Section 17(5) – Immovable Property

- ❑ What about ITC on Lifts, AC Plants etc ?
- ❑ M/s Kone Elevators vs. States of Tamil Nadu (WP No. 232 of 2005, dated 06.05.2014)

In the case of installation of lift after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. Once it has been established that the lift after its erection, installation and commissioning would be considered as part of the building and hence immovable property.

- ❑ No. of AAR decisions denying ITC.

Interest on ITC Reversal

Section 50

(1) 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 payable on that portion of the tax which is paid by debiting the electronic cash ledger.

Section 50

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.

(Amended retrospectively w.e.f 1.7.17 from 5.7.22)

(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed]

Points to Ponder

- ☐ Interest on net liability only.
- ☐ No interest on payment through ITC
- ☐ Can interest u/s. 50(3) be charged at present?
- ☐ No interest on ITC reversal?
- ☐ Section 50(3) has been amended by Finance Act, 2022 retrospectively w.e.f. 1.7.17. The amendment notified w.e.f. 5.7.22.

Recent Caselaws

Bharti Airtel Ltd [2021 (54) GSTL 257 (SC)]

ITC should be availed on self-assessment basis

- ❑ The primary source is in the form of agreements, invoices/ challans, receipts of the goods and services and books of accounts which are maintained by the assessee manually/electronically.
- ❑ Books of accounts and record ... are primary documents and source material on the basis of which self-assessment is done by the registered person including about his eligibility and entitlement to get ITC and of OTL.
- ❑ Form GSTR2A is only a facilitator for taking an informed decision while doing such self-assessment

D Y Beathel Enterprise [2021] 127 taxmann.com 80 (Madras)

- ❑ 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.
- ❑ 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

TVL Ashok Trading Company [2022 (60) GSTL 429 (Mad.)]

- ❑ Prime facie ... the petitioner had no documents to substantiate a valid availing of input tax credit.
- ❑ Mere reflection of the amounts in the Goods and Services Tax records electronically is not sufficient. If credit is to be allowed and adjusted on such transactions, it would lead to unintended benefits being conferred.

Safari Retreats Pvt. Ltd. [2019 (25) GSTL 341 (Ori.)]

- ❑ While considering the provisions of Section 17(5)(d), the narrow construction of interpretation put forward by the Department is frustrating the very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis... in our considered opinion the provision of Section 17(5)(d) is to be read down ... inasmuch as ...the very purpose of the credit is to give benefit to the assessee .
- ❑ ITC - beneficial provisions

Gargo Traders [2023] 151 taxmann.com 270 (Calcutta)

- ❑ Input tax credit - Denial of - ITC Fraud - Fake and non-existing supplier - **Input tax credit was denied on ground that supplier were fake and non-existing**; that bank accounts were opened by supplier on basis of fake document and, therefore, ITC claim of petitioner was not supported by any relevant document; that there was failure by petitioner to verify genuineness and identity of supplier whether they were registered taxable person (RTP) before entering into any transaction with supplier and ; that registration of supplier in question was already cancelled with retrospective effect covering transaction period of petitioner - HELD : **At time of transaction, supplier's name as registered taxable person was already available on Government record and petitioner paid amount on purchased articles as well as tax on same through bank and not in cash** - It was not a case of Department that there was a collusion between petitioner and supplier with regard to transaction - **Without proper verification, it cannot be said that there was any failure on petitioner's part in compliance of any obligation required under statute before entering into transactions in question** - Claim was rejected taking into consideration cancellation of registration of supplier with retrospective effect without considering documents relied on by petitioner- Concerned Authority should consider petitioner's grievance afresh by taking into consideration of documents which petitioner intended to rely in support of his claim and pass reasoned and speaking order

Apparent Marketing Pvt Ltd. [2022 (59) GSTL 399 (All.)]

- ❑ In the present case, undisputedly, the registration claimed by the assessee had been granted by the respondent authority. Therefore, a presumption does exist as to such registration having been granted upon due verification of necessary facts. If the respondent proposed to cancel the registration thus granted, a heavy burden lay on the respondent authority to establish the existence of facts as may allow for such cancellation of registration.
- ❑ ... by merely describing the assessee firm “bogus”, the respondent authority did not make known to the assessee the exact charge ... Correspondingly, the respondent authority deprived the assessee of the necessary opportunity to rebut the charge.

Kirloskar Electric Co. Ltd. [2018] 90 taxmann.com 157 (Karnataka)

- ❑ ...claim of credit of input tax is indefeasible as was the case of Cenvat under Excise law and such credit of ITC under VAT law which is equivalent to tax paid in the chain of sales of the same goods, cannot be denied on the anvil of machinery provisions or even provisions relating to time frame which is law of limitation only bars the remedy rather than negating the substantive claims under the taxing statutes.

**A B Pal Electricals Pvt Ltd [2020] 113 taxmann.com 172 (Delhi) &
Adinath Industries [2019] 110 taxmann.com 420 (Delhi)**

- ❑ We may further add that the credit standing in favour of an assessee is “**property**” and the assessee could not be deprived of the said property save by authority of law in terms of **Article 300A** of the Constitution of India

Suncraft Energy Pvt Ltd [2023] 153 taxmann.com 81 (Calcutta)

- ❑ Input Tax Credit - Reversal of credit - Non-Reflection of supplier's invoice in GSTR-2A - Period 2017-18 - Revenue reversed appellant's input tax credit alleging non-reflection of supplier invoices in GSTR 2A - Appellant argued compliance with section 16(2) and payment to supplier via valid tax invoice - HELD : **Press release dated 18-10-2018 clarifies GSTR-2A for taxpayer facilitation and does not impact input tax credit availing** - Reversal of credit from buyer is optional except under exceptional circumstances of collusion, missing supplier, or lack of assets. - Appellant had clarified invoice possession and payment via bank statements - Revenue failed to inquire on supplier despite clarifications - Court has already held denial of credit due to supplier's default as unconstitutional - Show cause notice found faults with appellant's GSTR 1 and not with tax invoice possession or receipt - Hence, action against supplier was essential before seeking reversal from appellant - Revenue's action deemed to be arbitrary- Impugned order was to be set aside and authorities had to follow CBIC guidelines

Jai Mata Di Cargo Services P. Ltd. [2018 (15) GSTL 226 (All.)]

- ❑ Once a transportation of goods ... is shown to be fraudulent, sham, bogus, circuitous or a device designed to evade tax under the Act, the statutory authorities under the Act and the court can always examine the substance of the transaction because the Legislature never intends to guard fraud

Jagadish Advertising [2021 (48) GSTL 227 (Kar.)]

- ❑ In the considered opinion of this Court, in light of the aforesaid judgments, the CENVAT credit is a concession and not a vested right and it has to be claimed keeping in view the CENVAT Credit Rules 2004 and therefore, the learned Single Judge has erred in law and in facts in allowing the writ petition by directing the Designated Committee to adjust the amount which was the subject matter of CENVAT credit

Thirumalakonda Plywoods [WP 24235 of 2022 (AP)]

- ❑ by nature ITC is a concession/rebate/benefit but not a statutory right has been reiterated in a thicket of decisions.
- ❑ It is clear that ITC being a concession/benefit/rebate, the legislature is within its competency to impose certain conditions, including time prescription · ... The time limit prescribed for claiming **ITC U/s 16(4)** of APGST Act/CGST Act, 2017 is not violative of Articles 14, 19(1)(g) and 300-A of the Constitution.

Kabeer Reality Pvt Ltd 2020 (33) GSTL 027 (MP)]

- ❑ There are twin effect of such non-filing of GSTR-3B Return, first is that no revenue is actually transferred to the Government and on the other hand, the persons/tenants, to whom the petitioner has issued invoices, would avail GST credit.... It is noteworthy to mention that GSTR-1 is declaration of tax liability and GSTR-3B is evidence of actual payment. ... tax determination has already been done ..., as the petitioner itself has quantified its tax liability under the GSTR-1.
- ❑ Not-filing GSTR-3B means no tax transferred to Government

Astha Enterprises [WP NO. 10395/ 2023] (Patna)

- ❑ However, as long as the tax paid by the purchaser to the supplier, is not paid up to the Government by the supplier; the purchaser cannot raise a claim of Input Tax Credit under the statute. • ...The mere fact that there is a mode of recovery provided under the statute would not absolve the liability of the tax payer .. • 6. M/s D.Y. Beathel Enterprises ... decision ignored the provision.. Section 16 (2)...Ecom Gill Coffee Trading ... does not absolve the assessee from .. Section 16 (2)

Ecom Gill Coffee Trading (P.) Ltd v State of Karnataka[2023] 148 taxmann.com 352 (SC)

- ❑ Input Tax Credit - Validity of transaction - Burden of proof - In instant case, Assessing Officer as well as first appellate authority denied ITC under KVAT as genuineness of purchase transaction was doubted on ground that selling dealers were either de-registered or had filed nil returns or had denied sale - In appeal, Tribunal allowed ITC by holding that payment of purchased goods was made under account payee cheques against invoice and that purchasing dealer should not suffer due to default of seller - High Court under impugned revision order, affirmed Tribunal order - HELD : Section 70 of KVAT clearly stipulated that burden of proof was on purchasing assessee to establish genuineness of transaction against which ITC had been claimed - Merely claiming to be a bona fide purchaser was not enough and sufficient to avail ITC - This burden of proof could not be shifted on revenue by mere production of invoices or fact of having made payments by account payee cheque to seller - Purchase transaction was required to be proved beyond doubt by furnishing other details and documents viz. name and address of selling dealer, details of vehicle which had delivered goods, payment of freight charges, acknowledgement of taking delivery of goods etc.- Aforesaid information was required in addition to tax invoices and payment particulars for establishing actual physical movement and receipt of goods - Intention of legislature for establishing genuineness of transaction, was clear in terms of section 70(2) - Impugned judgments and orders passed by High Court and Tribunal were to be set aside and quashed and orders of Assessing Officer and first appellate authority denying ITC to purchasing dealer was to be restored

Ronak Foods [2018 (15) GSTL 530 (Guj.)]

- ❑ ...purchases were made from those dealers whose registrations were cancelled on the ground that they were indulging in bogus billing ... later on suffered cancellation of registrations with retrospective effect... not placed before the authorities **any evidence of movement of goods or payments through banking channels**...Under such circumstances, no relief can be granted ...

ARS Steel & Alloy [2022 (52) GSTL 402 (Mad)]

- ❑ I am of the view that the reversal of ITC involving Section 17(5)(h) by the Revenue, in cases of loss by consumption of input which is inherent to manufacturing loss is misconceived, as such loss is not contemplated or covered by the situations adumbrated under Section 17(5)(h).

Maansarovar Motors Pvt Ltd [2021 (44) GSTL 126 (Mad.)]

- ❑ ... interest, as held by the Supreme Court in the case of Commissioner of Income Tax v. Anjum H. Ghaswala, (252 ITR 1), is indented to compensate the revenue for loss of capital. In the present case, there is no loss insofar as the revenue is in possession of the credit 'which is good as cash' as held by the Supreme Court in the case of Eicher Motors (supra) and cannot thus be said to be prejudiced in any way.
- ❑ No interest if ITC balance

Aathi Hotel [2022 (61) GSTL 343 (Mad.)]

- ❑ Though under Sections 73(1) and 74(1) of the Act, proceedings can be initiated for mere wrong availing of Input Tax Credit followed by imposition of interest, penalty either under Section 73 or under Section 74 they stand attracted only where such credit was not only availed but also utilised for discharging the tax liability.



Thank You !!

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