

Intricacies in ITC

RECENT ISSUES IN GST



exceeding expectations
SINCE 1985



SPEAKER:

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Input Tax Credit

Section 16(2) & Section 16(4) – CGST Act

Condition: Possession of Tax Invoice / Debit Note: Section 16 (2) (a) read with Rule 36 of the CGST Rules

“(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,-

*(a) he is in **possession of a tax invoice or debit note** issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*

(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”



Rule 96(10) / Pre-import condition under AA Scheme

- For alleged contravention of Rule 96(10) / pre-import condition, many importers have opted to discharge IGST on imported goods.
- Such IGST was discharged vide TR-6 challan and not by seeking re-assessment of the relevant Bill of Entry.
- Whether credit can be availed basis TR-6 challan?

Rule 36(1)(d) – “Any similar document”

- Rule 36(1)(d) provides that input tax credit shall be availed on the basis of *inter alia* a bill of entry, or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports.
- Thus, in terms of Rule 36(1)(d), credit of IGST paid on imported goods can be availed basis bill of entry.
- Per Rule 36(1)(d), credit of IGST paid on imported goods can also be availed basis “*any similar document*”
 - **prescribed under the Customs Act, 1962 or rules made thereunder; and**
 - **providing for assessment of IGST on imports.**

Whether TR-6 challan is a valid document?

- Possible to contend that TR-6 challan is a valid document for availing credit. Vide **CCE Vs. Essel Propack Ltd. – 2015 (39) STR 363 (Bom.)**.
- Where differential IGST is deposited through TR-6 challan, bill of entry read with TR-6 challan may be considered as eligible documents for availing credit of differential IGST.
- Desirable to pursue re-assessment of bills of entry with the Customs department to avoid unnecessary dispute(s).

Condition: Receipt of the goods or services Section 16 (2) (b)

“(b) he has received the goods or services or both.

Explanation.-For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—

- (i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;
- (ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.”

- How to substantiate receipt of services, which are inherently intangible?

Condition: Tax actually paid to government 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; and”

- Bonafide Purchaser
 - M/s Mahalaxmi Cotton Ginning Pressing & Oil Industries Vs State of Maharashtra – WP No. 33 of 2012 – Bom HC
 - On Quest Merchandising India Pvt Ltd [2017-TIOL-2251-HC-DEL-VAT] Delhi High Court Decision.
 - SLP filed by Department before SC dismissed - Arise India Limited [2018-TIOL-11-SC-VAT]
 - Proceeding initiated against supplier under IBC / NCLT – whether tax deemed to have been paid to Government?

Denial of ITC to recipient on account of mismatch (2A vs 3B)

Suncraft Energy Private Limited & Anr. Vs. State Tax, Ballygunge Charge & Ors. [2023-VIL-487-CAL]

Facts: ITC disallowed to the recipient despite fulfilling conditions under Section 16(2) [prior to amendment] due to non-reflection of invoice in GSTR-2A

Held by HC:

- No doubt on receipt of goods / services
- No inquiry conducted against supplier. Before directing reversal of credit, action must be taken against the selling dealer who has not paid tax except in exceptional cases - where seller is missing or has close down its business or does not have any assets and such other contingencies.
- Furnishing of details in Form GSTR 1 and the facility to view the same in Form GSTR 2A by the recipient is in the nature of tax-payer facilitation and does not impact the ability to avail ITC under Section 16.

Before Hon'ble Supreme Court [2023-VIL-99-SC]

Having regard to the facts and circumstances of the case and the extent of demand being on the lower side, not inclined to interfere in these matters - The Special Leave Petitions are dismissed

Denial of ITC to recipient on account of mismatch (2A vs 3B)

Diya Agencies Vs. State Tax Officer & Ors. [2023-VIL-629-KER]

Facts: Petitioner's claim for ITC has been denied on the ground that the said amount is not mentioned in GSTR 2A. Order passed without given an opportunity of hearing to the Petitioner.

Held: Matter remanded back to the Assessing Officer to give an opportunity to the Petitioner to give evidence in respect of his claim of ITC.

- Petitioner has to discharge the burden of proof regarding the remittance of tax to seller by giving evidence.
- If claim is bonafide and genuine, Petitioner should be given ITC.
- ITC cannot be denied only on the ground that the amount is not reflected in Form GSTR 2A.

Reversal of credit under Section 16(2)(c) on non-remittance of tax by supplier

Pinstar Automotive India Pvt. Ltd. Vs. Additional Commissioner [2023-VIL-188-MAD]

Facts: Notice issued to the Petitioner directing reversal of credit on non-remittance of tax by the supplier.

Held:

- If tax liability has been met by way of reversal of ITC and also recovered from the supplier, it will amount to double benefit to revenue.
- Protective move: To restore the credit reversed, if liability is made good by supplier.
- Substantive liability upon supplier.
- Protective liability upon the purchaser/ recipient.

Points to ponder:

- Section 41 amended from 01.10.2022
- Rule 37A relevant for the same – reversal to be made in case of non-filers – short filers not covered?
- To reverse by 30th November, if supplier does not file GSTR-3B by September
- Utilised / unutilised balance - interest
- Section provides for applicability of interest – rule provides for interest after November?
- Supplier to pay tax along with interest resulting in interest being paid twice (once by supplier and then by recipient). No provision for recipient to get back interest

Reversal of credit under Section 16(2)(c) on non-remittance of tax by supplier

M/s Aastha Enterprises Vs. State of Bihar & Anr. [2023-VIL-546-PAT]

Facts: Purchaser has paid tax to the Seller, evidenced by the tax invoice. Seller did not deposit the tax to the government after collecting from purchaser. Department denied the ITC to the purchaser.

Held: ITC is a benefit or concession conferred under the Statute. [Ref.: ALD. Automobile Private Limited]

- The conditions for availment of credit has to be scrupulously followed failing which there can be no benefit conferred on the assessee. ITC can only be claimed if the supplier has deposited the collected tax to the government. This is a burden of proof cast on the purchasing dealer
- If government recovers the tax amount from the seller using its machinery at the later point of time, the purchaser can seek refund of the tax paid to supplier.
- Production of tax invoice, establishment of moment of goods and receipt of the same and consideration paid through bank accounts would not enable ITC unless tax is paid by supplier.
- **Strict interpretation of provision**

Cancellation of registration of supplier (with retrospective effect)

- *If transaction was made before cancellation of registration of supplier, then benefit of ITC is available*
 - **LGW Industries Ltd. Vs. UOI – 2021 (12) TMI 834 - CALCUTTA HIGH COURT**
 - **Sanchita Kundu Vs. ACST – 2022 (5) TMI 786 - CALCUTTA HIGH COURT**
 - **Gargo Traders Vs. CCT – 2023 (6) TMI - CALCUTTA HIGH COURT**
- *Thus, a registered person is not entitled to credit of input tax in respect of any supply of goods or services of both if tax is not paid to the Government. The registration of the second respondent has been cancelled on 31-10-2018 before three invoices dated 23-11-2018 were raised. Thus, it is clear that the second respondent could not have paid the tax to the ex-chequer. - **JAI BALAJI PAPER CONES Vs ASSISTANT COMMISSIONER OF SALES TAX, TIRUCHENGODE - 2023 (78) G.S.T.L. 337 (Mad.)***

Constitutional Validity of Section 16(2)(c)

- In **M. Trade Links & Ors. Vs. UOI & Ors. – 2024 (6) TMI 288**, Kerala High Court upheld the constitutional validity of Section 16(2)(c).

Condition: Failure to pay consideration - IIND & IIIRD proviso to Section 16 (2) (d) r/w Rule 37 of the CGST Rules

“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.”

Invoices received by ISD and credit distributed to various units

- Whether payment of consideration within 180 days to be seen at ISD level or unit level?
- Suppose payment of invoice initially received by ISD not made within 180 days, then who is liable to reverse ITC – ISD or the concerned unit(s) in proportion to credit distributed to them?

Condition: Time period for availment of the credit - 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 thirtieth day of November 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 the time limit for availment of the credit will apply on taking credit under reverse charge Mechanism? Circular No. 211/5/2024-GST dated 26.6.2024 issued to clarify.
- ITC eligibility in case Form GSTR-3B return pertaining to month of March 2024 is filed by the supplier in December 2024 with interest?

Whether ITC can be denied on belated filing of GSTR 3B?

M/s. Kavin HP Gas Gramin Vitrak Vs. Commissioner of Commercial Taxes & Anr. [2023-VIL-896-MAD]

Facts: Petitioner's ITC denied on the ground of belatedly filing of GSTR-3B under Section 16(4).

Held: Rule 60 prescribes Form GSTR-2 to specify the inward supplies for claiming ITC. Since the said form is not notified, the Petitioner cannot be expected to file the same to claim ITC without notifying the Form.

- In absence of any enabling mechanism, assessee cannot be prejudiced by not granting ITC. [Ref.: Adfert Technologies Pvt. Ltd. Vs. Union of India, 2019-VIL-537-P&H]
- Petitioner had no intend to violate the provisions of the Act, the same is evident from the fact that he has filed the return physically when GSTN did not allow filing of return.
- There is no option of incomplete filing GSTR 3B. If output tax not paid, GSTN network does not allow filing of GSTR 3B, due to this, Petitioner was unable to claim ITC within the prescribed time under Section 16(4).
- Petitioner shall be allowed to file manual returns to claim ITC without paying tax on outward supply/sales. Belated returns to be accepted and ITC shall be allowed.

Constitutional Validity of Section 16(4)

- *“Provision under sub-section (4) of Section 16 ibid 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 300A ibid - Further fiscal legislation having uniform application to all registered persons, cannot be said to be violative of Article 19(1)(g) ibid and question of such statutory provision being violative of Article 302 ibid and Article 13 ibid does not arise at all” - **Gobinda Construction & Ors. vs. Union Of India & Ors. [2023-VIL-623-PAT]***
- Other High courts where the Section 16(4) where constitutional validity of Section 16(4) was challenged and held that Section 16(4) of the CGST Act is violative of neither Article 14 of the Constitution nor Articles 19(1)(g) & 300A of the Constitution,
 - ***Jain Brothers vs Union of India (Chhattisgarh HC)***
 - ***Thirumalakonda Plywoods vs ACST, Anantapur (Andhra Pradesh HC)***
 - ***BBA Infrastructure Limited vs Senior Joint Commissioner (Calcutta High Court)***

Section 16(4) of the CGST Act – time limit

- Section 16(1) is the enabling provision and Section 16(2) restricts the credit which is otherwise allowed to the dealers.
- Language of Section 16 does not suffer from any ambiguity and clearly stipulates grants of ITC subject to conditions and restrictions thereunder.
- ITC is not unconditional. ITC is in the nature of benefit or concession which can be extended to the recipient under the statutory scheme subject to fulfilment of conditions. Section 16(4) is one of the conditions which makes a registered person entitled to ITC.
- Section 16(4) is not violative of Article 14, Article 19(1)(g), and Article 300A, of the Constitution of India.
- Fiscal legislation having uniform application to all registered persons cannot be said to be violative of Article 19(1)(g).
- Fundamental rule of statutory interpretation: where words are clear, no obscurity, intent of legislature clearly conveyed, there is no scope for Court to innovate or take upon itself the task of amending or altering the statutory provisions.

- Gobinda Construction & Ors. vs. Union Of India & Ors. [2023-VIL-623-PAT]
- M/s Jain Brothers vs. Union Of India & Ors. [2023-VIL-901-CHG]
- M/s. BBA Infrastructure Limited vs. Senior Joint Commissioner of State & Ors. [2023-VIL-881-CAL] Thirumalakonda Plywoods vs. Assistant Commissioner and Ors. [2023-VIL-472-AP]

Apportionment of Input Tax Credit

Section 17(2)

- Section 17(5)(2) states that ITC relating to taxable supplies including zero rated supplies shall be allowed and ITC relating to exempt supplies shall be blocked.
- **A, B, C, D & E are input services. X is taxable supply, Y1 is some exempt supply & Y2 is some other exempt supply.**
- A, B & C are common input services for X, Y1 & Y2.
- D is common input service for X & Y1.
- E is common input service for X & Y2.
- How to apportion ITC in this case?

Section 17(5)(b)(i)

- Section 17(5)(b)(i) states that ITC shall not be available in respect of supply of food and beverages, outdoor catering etc. Proviso to Section 17(5)(b)(i) provides that where it is obligatory for an employer to provide such goods or services or both to its employees under any law for the time being in force, then ITC shall be available.
- **In Re: Tata Motors Ltd. – (2023) 71 GSTL 302 (App. AAR – Guj.)** holding that:
 - ITC of tax charged by service provider in respect of canteen facility to direct employees available;
 - No ITC in respect of other employees including contract employees / workers;
 - Further, ITC restricted to cost borne by company for providing canteen facility and proportionate credit to the extent attributable to cost of food recovered from direct employees disallowed.

Section 17(5)(c)/(d) – Points for Consideration



“(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 and 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 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.

- What constitutes plant and machinery – prone to litigation.



Section 17(5)(h) – Points for Consideration

- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;
- **Goods destroyed:** Pharmaceutical industry – return of expired drugs / medicines from retailers / wholesalers to manufacturer and manufacturer subsequently destroys such drugs / medicines
- If manufacturer issues GST credit note within time limit, manufacturer entitled to adjust tax liability provided person returning expired goods has either not availed ITC (on initial supply) or if availed has reversed ITC so availed.
- Mechanism to ensure person returning expired goods has either not availed ITC or reversed ITC if availed?
- Circular No. 72/46/2018-GST dated 26.10.2018



Section 17(5)(h) – Points for Consideration

- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;
- **Goods written off:** meaning of “written off”?
- Written off partially or fully?
- Whether provision created in books of account for slow-moving inventory can be treated as written off



Section 17(5)(h) – Points for Consideration

- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;
- **Goods disposed by way of gift**
- White goods supplied to dealers / channel partners as part of sales incentive scheme – whether hit by this bar?
- The applicant’s obligation to issue gold coins and white goods to the dealers/customers upon achieving the stipulated lifting of the material/purchase target during the scheme period would not be regarded as “goods disposed of by way of gift” and Input tax credit would not be restricted under the Section 17(5)(h) of the CGST Act, 2017. Refer **ORIENT CEMENT LTD. – 2023 (77) GSTL 279 (AAR - GST - Kar.)**.



Section 17(5)(i) – Points for Consideration

- (i) any tax paid in accordance with the provisions of sections 74, 129 and 130.
- If proceeding initiated against supplier under Section 73 and supplier decides to pay differential tax – at any stage – through DRC-03 or GSTR-3B or Electronic Liability Register.
- How can the recipient avail ITC of differential tax discharged by supplier?

Eligibility of ITC relating to IPO expenses

Eligibility of ITC relating to IPO expenses

Eligibility of ITC

In case of Fresh Issue

| | |
|---------------------|--|
| For Company | <ol style="list-style-type: none"> Whether will be considered to be "<i>used/ intended to be used in the course or furtherance of business</i>" – Sec 16(1) Whether reversal of ITC required u/s 17(2) & 17(3) of the CGST Act |
| For Promoter | NA |

In case of OFS

| | If Pure Agent conditions are <u>fulfilled</u> | If Pure Agent conditions are <u>not fulfilled</u> |
|---------------------|---|--|
| For Company | <ol style="list-style-type: none"> No GST output liability ITC not eligible on input services | <ol style="list-style-type: none"> GST leviable on recovery of expenses ITC eligible on input services |
| For Promoter | ITC not eligible, as services relating to transaction in Security – Section 17(3) | ITC on tax charged by company not eligible, as services relating to transaction in security – Section 17(3) |

Issuance of Shares – Whether reversal of ITC required under Section 17?

- Section 17(2) – Input tax credit restricted to the extent of taxable supplies. ITC to the extent of exempted supplies required to be reversed
- Section 17(3) - *The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, **transactions in securities**, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.*
- Securities neither covered under the definition of “goods” nor “services” – however **“TRANSACTION IN SECURITIES”** covered under the purview of “exempt supplies” for the purpose of reversal of ITC

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