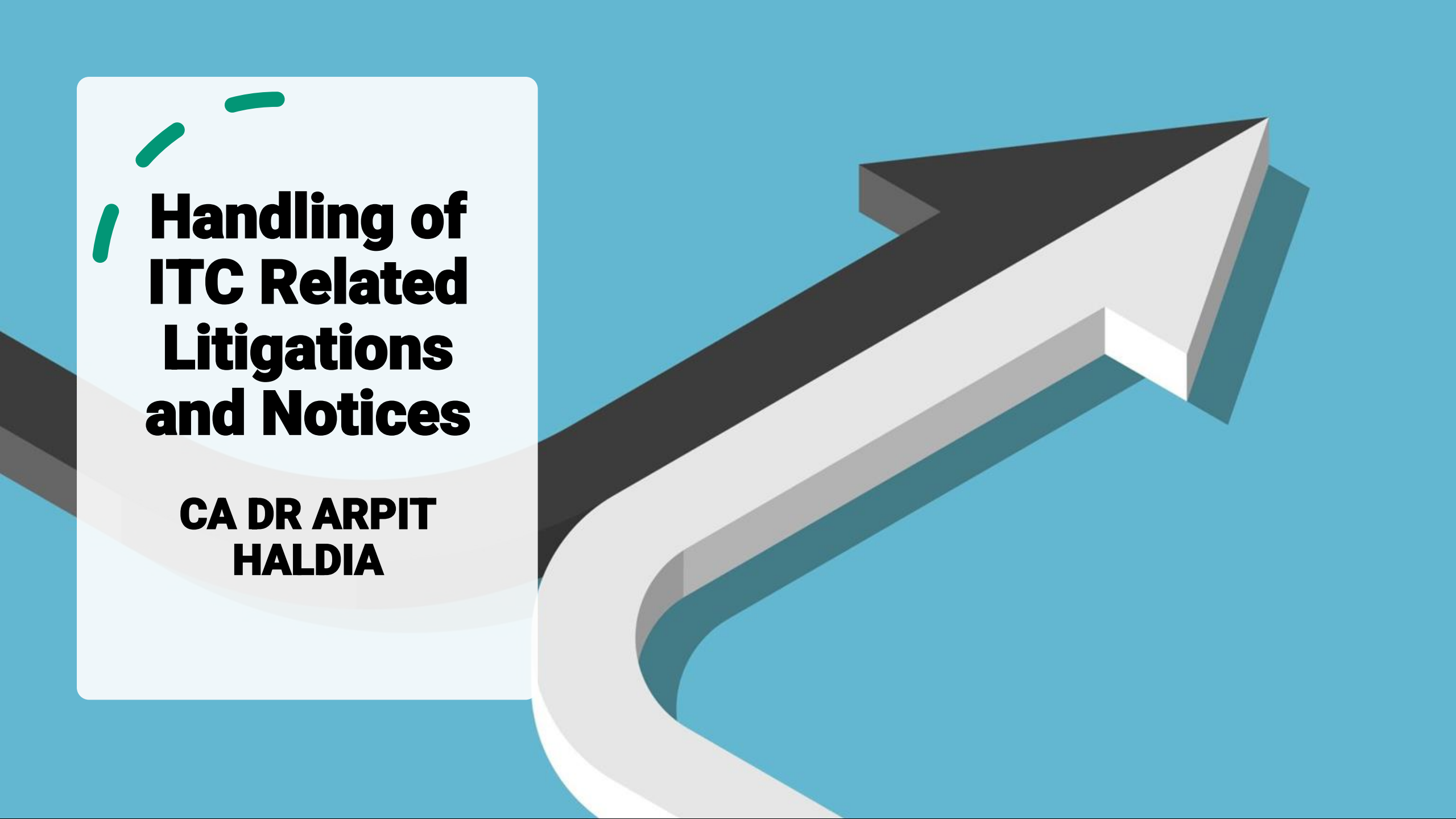
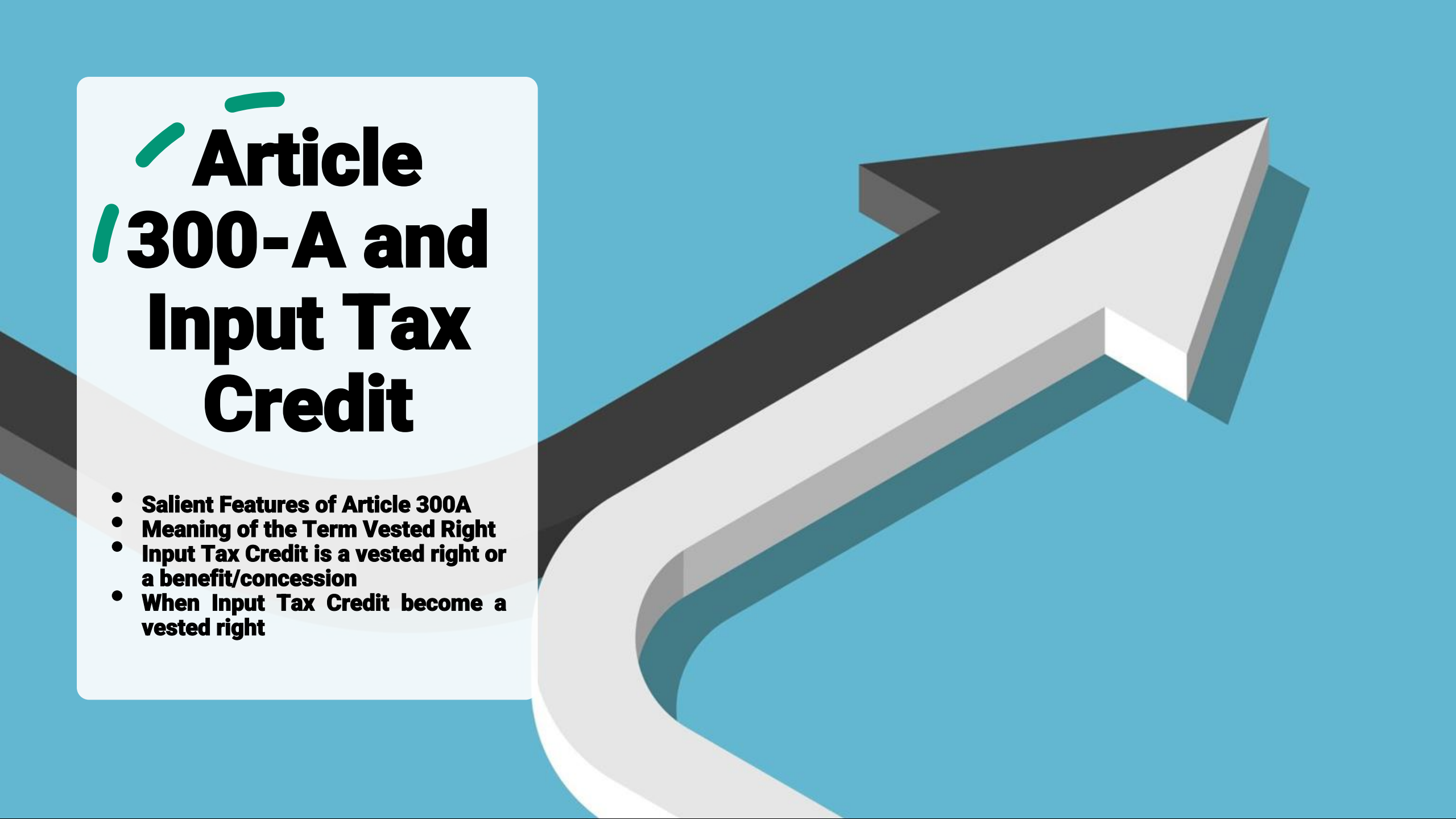
Handling of ITC Related Litigations and Notices

CA DR ARPIT HALDIA

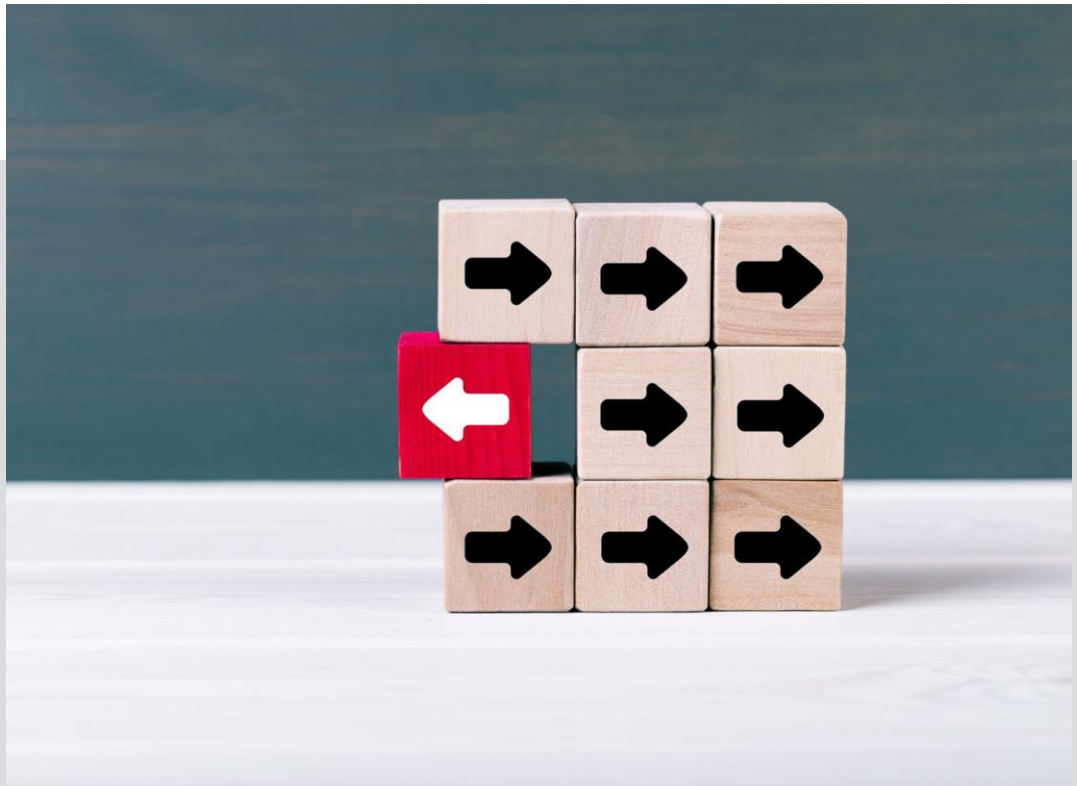


Article 300-A and Input Tax Credit

- Salient Features of Article 300A
- Meaning of the Term Vested Right
- Input Tax Credit is a vested right or a benefit/concession
- When Input Tax Credit become a vested right



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 This provision was been repealed through the 44th Amendment but it re-appeared as Art. 300A.

Article 300A confers some protection on private property, but the constitutional provision does not enjoy the status of a Fundamental Right. 44th Amendment of the Constitution in 1978 transformed the right to property from the category of Fundamental Rights by repealing Art. 31, and converted it into an ordinary constitutional right by enacting Art. 300A

Though Art. 300A is not a Fundamental Right, nevertheless, it does not make much of a difference except that a writ petition is not maintainable under Art. 32 in the Supreme Court to vindicate the right under Art. 300A.

A person challenging violation of Art. 300A must go to a High Court under Art. 226 with his writ petition.

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

Art. 300A provides that no person shall be deprived of his property save by authority of law. The State Government cannot while taking recourse to the executive power of the State under Art. 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Art. 162, as is clear from the opening words, is subject to other provisions of the Constitution. **It is, therefore, necessarily subject to Art. 300A.** The word 'law' in the context of Art. 300A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order; having the force of law, that is positive or State made law.

State Of Mysore And Ors. vs K. Chandrasekhara Adiga And Anr. on 28 January, 1976 Equivalent citations: AIR 1976 SC 853, (1976) 2 SCC 495

Therefore, these rights could be curtailed, abridged or taken away only by law and not by an executive fiat.

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

The unreasonableness is writ large in this piece of legislation and this one is a striking example for the saying : "Wherever the enforcement machinery is sluggish, it is sought to be covered up by plethora of legislations'. Though there is legislative competence for enacting S.14 (4) such legislation offends the Constitutional rights of an individual to hold property. It is also seen that there is deprivation of property, or the value of property, on the facts and circumstances of the present case. This clearly comes within the meaning of Art. 300-A of the Constitution which states -

"No person shall be deprived of his property save by authority of law". This deprivation, as we have seen already, is made by a law which does not satisfy the test of reasonableness.

81. For all these reasons, we are of the view that S 14 (4) offends Arts 14, 19(1)(g) and also Art, 300-A of the Constitution of India.

Part-3-Meaning of Law-Hindustan Times & Ors vs State Of U.P. & Anr on 1 November, 2002 (SC)

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.

Meaning of the Term Vested Right

Meaning of the term "vest"- Howrah Municipal Corpn. & Others vs Ganges Rope Co. Ltd. & Others on 19 December, 2003 (SC)

The word 'vest' is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. *With the long usage the said word 'vest' has also acquired a meaning as "an absolute or indefeasible right" [See K.J. Aiyer's 'Judicial Dictionary' (A complete Law Lexicon), Thirteenth Edition].*

Mening of Term "Vested"-Mosammat Bibi Sayeeda & Ors. Etc vs The State Of Bihar & Ors. Etc on 25 April, 1996 Equivalent citations: 1996 AIR 1936, JT 1996 (4) 637

The word 'vested" is defined in Black's Law Dictionary [6th Edn.] at page 1563 as "Vested. Fixed; accrued; settled; absolute; complete. Having the character or given the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent" ***Rights are "vested" when right to enjoyment, present or prospective, has become property of some particular person or persons as present interest; mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing law, does not constitute vested rights.*** *In Webster's Comprehensive Dictionary, [International Edn.] at Page 1397 'vested" is defined as "[L]aw held by a tenure subject to no contingency; complete; established by law as a permanent right; vested interests".*

Vested right is a right independent of any contingency-J.S.Yadav vs State Of U.P & Anr on 18 April, 2011

Thus, "vested right" is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law.

The Supreme Court further observed that

In Union of India & Ors. V. Tushar Ranjan Mohanty & Ors., (1994) 5 SCC 450, this Court declared the amendment with retrospective operation as ultra vires as it takes away the vested rights of the petitioners therein and thus, ***was unreasonable, arbitrary and violative of Articles 14 and 16 of the Constitution.*** While deciding the said case, this Court placed very heavy reliance on the judgment in P.D. Aggarwal & Ors. v. State of U.P. & Ors., AIR 1987 SC 1676, wherein this Court has held as under:

"…the Government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution."

Hungerford Investment Trust … vs Haridas Mundhra & Others on 9 March, 1972 Equivalent citations: 1972 AIR 1826, 1972 SCR (3) 690

The mere right to take advantage of the provisions of an Act is not accrued right.

WHETHER ITC IS A VESTED RIGHT OR CONCESSION

Godrej and Boyce Mfg. Co. Pvt. Ltd. and Others versus Commissioner of Sales Tax and Others, (1992) 3 SCC 624

We fail to understand how a valid grievance can be made in respect of such deduction when the very extension of the benefit of setoff is itself a boon or a concession.

Jayam and Company versus Assistant Commissioner and Another, (2016) 15 SCC 125

It is a trite law that whenever concession is given by statute or notification, etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but it is a concession granted by virtue of Section 19

Karnataka Value Added Tax Act, 2013 in State of Karnataka versus M.K. Agro Tech.(P) Ltd., (2017) 16 SCC 210:-

Keeping in view this objective, the legislature has intended to give tax credit to some extent. However, how much tax credit is to be given and under what circumstances, is the domain of the legislature and the courts are not to tinker with the same.

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

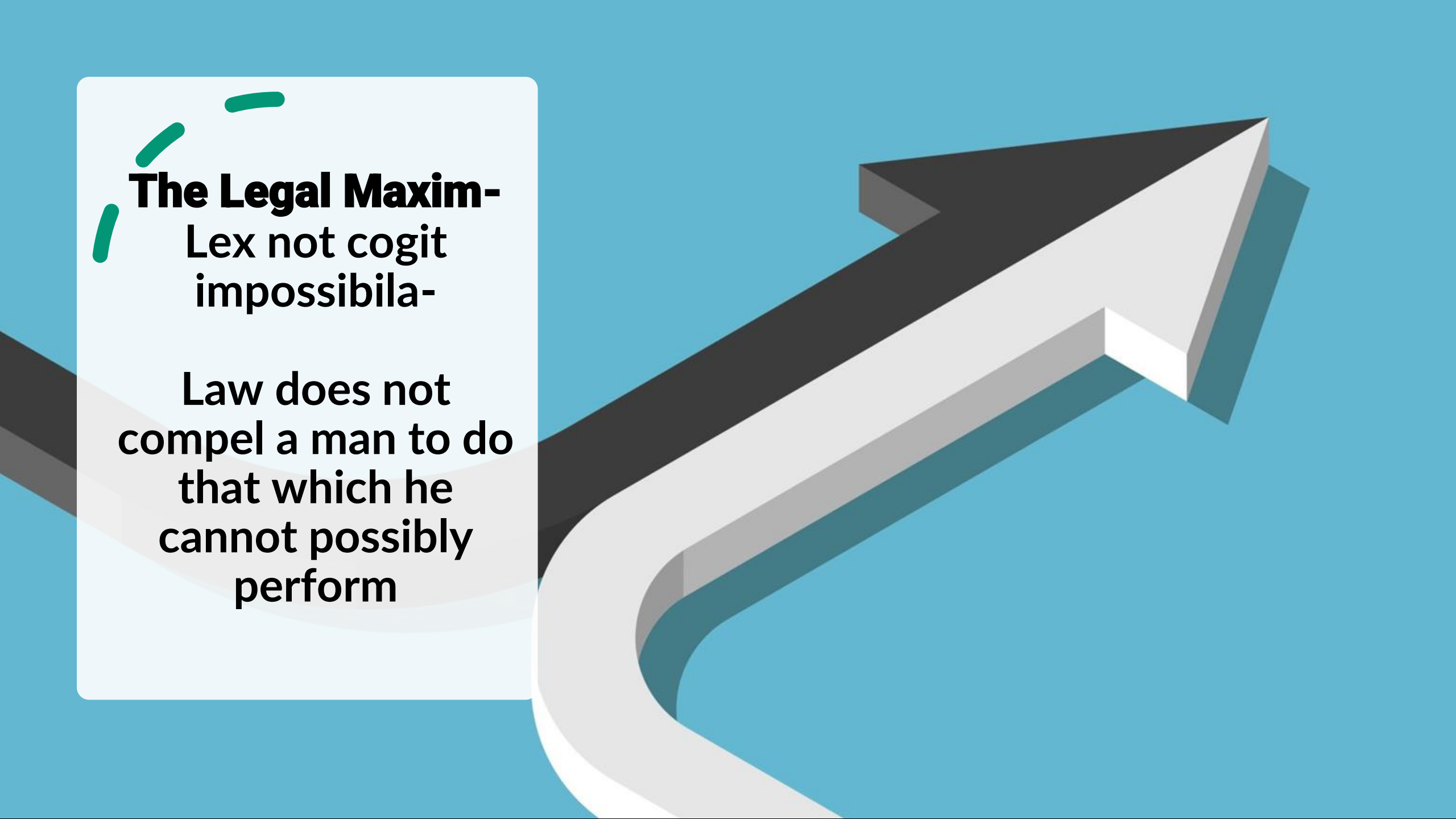
The input credit is in nature of benefit/ concession extended to dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the Statute.

Eicher Motors Ltd. And Anr vs Union Of India And Ors. Etc on 28 January, 1999 (SC) :- Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory on the basis of the existing Scheme.

Collector Of Central Excise, Pune ... vs Dai Ichi Karkaria Ltd. Etc. Etc on 11 August, 1999 (SC):- It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof.

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

Commissioner Of Income Tax vs M/S. Cello Plast on 27 July, 2012 (Bom HC)

Lex not cogit impossibila (law does not compel a man to do that which he cannot possibly perform) and impossibilum nulla oblignto est (law does not expect a party to do the impossible) are well known maxims in law and would squarely apply to the present case. ***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.***

The Inter College, Through Its ... vs The State Of U.P. Through ... on 6 January, 2006 (All HC)

If the authorities for their own default sit tight and idle, did not bother for making the forms available to the institutions, is it permissible subsequently to the authorities to require the college and the students to adhere to the time schedule prescribed in the regulation and else face consequences. In our view the answer would be ‘No’ since neither the said provision can be read in such manner nor the Regulations permit such interpretation. ***“Lex Non Cogit ad impossibilia.” The law does not compel a man to do that which he cannot possibly perform. The other similarly recognized legal maxims are “Impotentia Excusat Legim” and “neon tenatur ad impossibilia.” 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.***

Huda And Anr vs Dr. Babeswar Kanhar And Anr on 22 November, 2004 (SC)

Apart from the said section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (see Sambasiva Chari v. Ramasami Reddi). *The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open. The reason is that law does not compel the performance of an impossibility.* ***(See Hossein Ally v. Donezelle 2.)*** *Every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying are lex non cogit ad impossibilia (the law does not compel a man to do the impossible) and actus curiae neminem gravabit (the act of court shall prejudice no man).*

State Of Rajasthan & Anr vs Shamsher Singh on 1 May, 1985 Equivalent citations: 1985 AIR 1082, 1985 SCR Supl. (1) 83

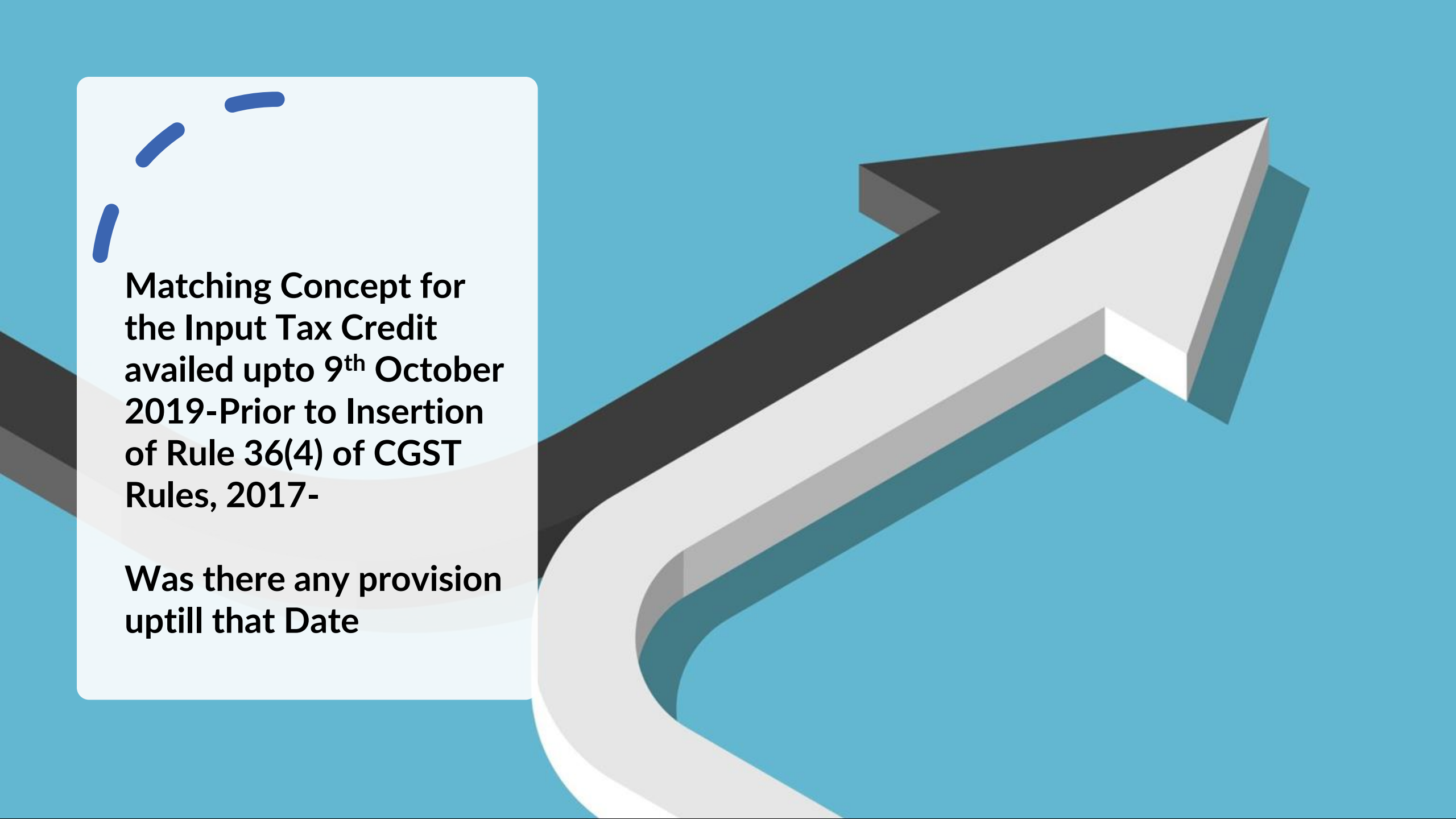
Mr. Jethmalani placed before us a passage from Broom’s Legal Maxims (p. 162), 10th Edn., where the doctrine of impossibility of performance (lex non cogit ad impossibilia) has been discussed. ***It has been indicated therein that however mandatory the provision may be, where it is impossible of compliance that would be a sufficient excuse for non-compliance, particularly when it is a question of the time factor****. Keeping the attendant circumstances of this case in view, we find it difficult to hold that the time taken by the State Government can amount to withholding of the representation which resulted in non-compliance of Section 10 of the Act so as to vitiate the detention.*

In Re: Presidential Poll vs Unknown on 5 June, 1974 Equivalent citations: (1974) 2 SCC 33, 1975 1 SCR 504

The maxim of law impotentia excusal legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses, ***The law does not compel one to do that which one cannot possibly perform. “Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him.” Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse****. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God. (Sec Broom’s Legal Maxims 10th Edition at pp. 1962-63 and Craies on Statute Law 6th Ed. p. 268).*

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

- 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;

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.

By virtue of the legal principle lex non cogitate ad impossible, can there be 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.

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:

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.

What if my Supplier has Filed GSTR-1 and not Filed GSTR-3B and I have Tax Invoice

As per the provisions of Section 16(2) of CGST Act, tax charged in respect of such supply should be actually paid to the Government. Therefore, if supplier has not filed GSTR-3B but has only filed GSTR-1, therefore it would mean that Tax in respect of such supply has not been paid to the Government.

Relevant Discussion-Section 16(2)(c) of CGST Act, 2017

What if I have Tax Invoice and my Supplier has Filed GSTR-3B and but has not reflected my GSTIN in GSTR1

As per the provisions of Section 16(2) of CGST Act, tax charged in respect of such supply should be actually paid to the Government. Therefore, if supplier has filed GSTR-3B but has not filed GSTR-1, it would still mean that Tax in respect of such supply has been paid to the Government.

Therefore, if rest of the conditions of Section 16 of CGST Act, 2017 have been satisfied like Possession of Tax Invoice, receipt of goods and services and submission of Return under section 39, ITC in respect of Such Invoice would be allowed.

Relevant Discussion-Provisions of Section 42 of CGST Act, 2017

What if I have Tax Invoice and my Supplier has neither Filed GSTR-3B and but has not filed GSTR1

As per the provisions of Section 16(2) of CGST Act, tax charged in respect of such supply should be actually paid to the Government. Therefore, if supplier has not filed GSTR-3B, it would mean that Tax in respect of such supply has not been paid to the Government.

Therefore, it would be an hinderance in the availment of Input Tax Credit and might result in denial of Input Tax Credit .

Relevant Discussion-Provisions of Section 16(2)(c) of CGST Act, 2017 and Section 42 of CGST Act, 2017

Mismatch in ITC claimed and reflected in GSTR-2A due to error of supplier

If ITC is claimed as per tax charged on invoice and proper GST details mentioned, but still there is a mismatch due to seller's mistake, is there a way to rectify this based on invoice as a proof ?

Relevant Discussion-Non-Compliance of Provisions of Section 42 of CGST Act, 2017

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

Mangalore Chemicals & Fertilizers Ltd. v. Deputy Commissioner, reported in 1991 (55) E.L.T. 437 (S.C.), wherein it was held that mere fact that a condition is statutory does not matter one way or the other. **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.

Hospira Health Care India P. Ltd. v. Development Commissioner, MEPZ, SEZ & Heous, Chennai, reported in 2016 (340) ELT 668 (Madras), has held that a procedure should not run contrary to the substantive right in the policy. If the procedural norms are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, are liable to be held bad in law.

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. 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.**

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.** As held by the Supreme Court in the case of Eicher Motors Ltd (supra) an assessee would be entitled to take credit of input already used by the manufacturer in the final product. In the said case, the Supreme Court was dealing with rule 57F which was introduced in the Central Excise Rules, 1944 under which credit lying unutilized in the Modvat credit account of an assessee on 16th March 1995 would lapse. Such provision was questioned. The Supreme Court held that since excess credit could not have been utilized for payment of the excise duty on any other product, the unutilised credit was getting accumulated. For the utilization of the credit, all vestitive facts or necessary incidents thereto had taken place prior to 16.3.1995. Thus the assessees became entitled to take the credit of the input instantaneously once the input is received in the factory of the manufacturer of the final product and the final product which had been cleared from the factory was sought to be lapsed. The Supreme Court struck down the rule further observing that if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilized in the manufacture of further products as inputs thereto then the tax on those goods gets adjusted which are finished subsequently. Thus a right had accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. We may also recall that in the case of Dai Ichi Karkaria Ltd (supra) it was reiterated that a manufacture obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable produce immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product."*

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

Hon'ble Madras High Court in the matter **of Sun Dye Chem Vs. The Assistant Commissioner (ST) [2020 VIL 524 (Mad)** wherein 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.** The Petitioner was thus unable to correct the error.

*17. A registered person who files a return under Section 39(1) involving intra-State outward supply is to indicate the collection of taxes customer-wise in monthly return in Form GSTR-1 and the details of tax payment therein are auto populated in Form GSTR -2-A of the buyers. Any mismatch between Form GSTR-1 and Form GSTR-2A is to be notified by the recipient by way of a tabulation in Form GSTR-1A. **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.***

18. Undoubtedly, the petitioner in this case has committed an error in filing of the details relating to credit. What should have figured in the CGST/SGST column has inadvertently been reflected in the ISGT column. It is nobody's case that the error was deliberate and intended to gain any benefit, and in fact, by reason of the error, the customers of the petitioner will be denied credit which they claim to be legitimately entitled to, owing to the fact that the credits stands reflected in the wrong column. It is for this purpose, to ensure that the suppliers do not lose the benefit of the credit, that the present writ petition has been filed.

*19. Admittedly, the 31st of March 2019 was the last date by which rectification of Form – GSTR 1 may be sought. **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 assessees 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.

Hon'ble Madras High Court in the matter of **Pentacle Plant Machineries Pvt. Ltd. Vs 1.Office of the GST Council wherein 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.***

*The revenue does not dispute the position that Forms GSTR-2 and 1A are yet to be notified. It also does not dispute the position that goods have reached the intended recipient. **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 petition 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)]***.

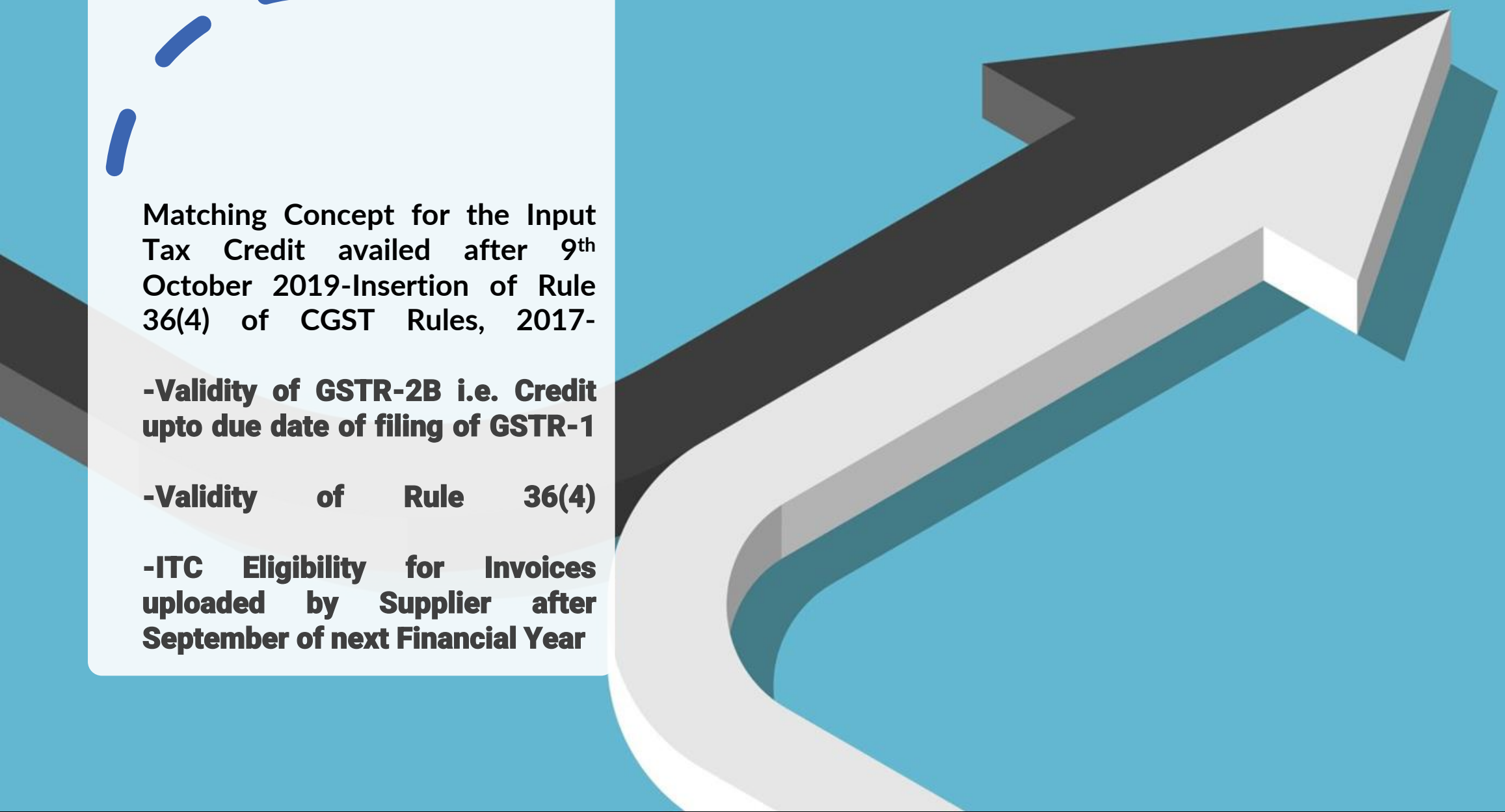
To summarise, since Forms GSTR-1A and GSTR-2 (erroneously mentioned as GSTR-2A in para-17 of order dated 06.10.2020 in WP.No.29676 of 2019) are yet to be notified, the petitioner should not be mulcted with any liability on account of the bonafide, human error and the petitioner must be permitted to correct 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. 11th Nov, 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 inserts 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-5-Conclusing 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.

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. MajjiJangammyya&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) PaluruRamkrishananiah&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 Lokayukta&ors., AIR 1998 SC 96.

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-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.

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;".

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).**

General Officer … vs Subhash Chandra Yadav & Anr on 25 February, 1988 Equivalent citations: 1988 AIR 876, 1988 SCR (3) 62 wherein it was held that

"before a rule can have the effect of a statutory provision, two conditions must be fulfilled, namely, (1) it must conform to the provisions of the statute under which it is framed; and (2) ***it must also come within the scope and purview of the rule-making power of the authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void."***

Sukhdev Singh & Ors vs Bagatram Sardar Singh … on 21 February, 1975 Equivalent citations: 1975 AIR 1331, 1975 SCR (3) 619 wherein it has been held that

"Statutory bodies cannot use the power to make rules and regulations to enlarge the powers beyond the scope intended by the legislature. *Rules and regulations made by reason of the specific power conferred by the stature to make rules and regulations establish the pattern of conduct to be followed".*

State Of Karnataka And Anrvs H. Ganesh Kamath Etc. Etc on 31 March, 1983 Equivalent citations: 1983 AIR 550, 1983 SCR (2) 665 wherein Hon'ble Apex Court held that

It is a well settled principle of interpretation of statutes that the conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent there with or repugnant thereto.

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.

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. Interestingly, the power to frame rules with retrospective effect is also conferred subject to the limitation that it should not pre-date the date of entry into force of the CGST Act. Pursuant thereto, Rule 117 was framed whereby a time limit was fixed for submitting the on line Form GST TRAN -1. By the Finance Act of 2020, the words "within such time" were introduced in Section 140, with retrospective effect from 01.07.2020, thereby conferring expressly the power to prescribe time limits in Section 140 even without relying entirely on the generic Section 164. In this statutory context, we find ample reason to conclude that Rule 117 of the CGST Rules is intra vires Section 140 of the CGST Act but none to conclude otherwise.

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. In addition, the Court concluded that ITC is a concession which is required to be availed of within the prescribed time, failing which it would lapse. The Gujarat High Court also considered this question in Willowood Chemicals Ltd. v. Union of India [2014 (306) ELT 551](Willowood). In Willowood, the Gujarat High Court concluded that Transitional ITC is a concession and that Rule 117 is intra vires Section 140 of the CGST Act.

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.*

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) The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a rule which comes in conflict with the main enactment has to give way to the provisions of the main enactment.

28) It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel:

"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."

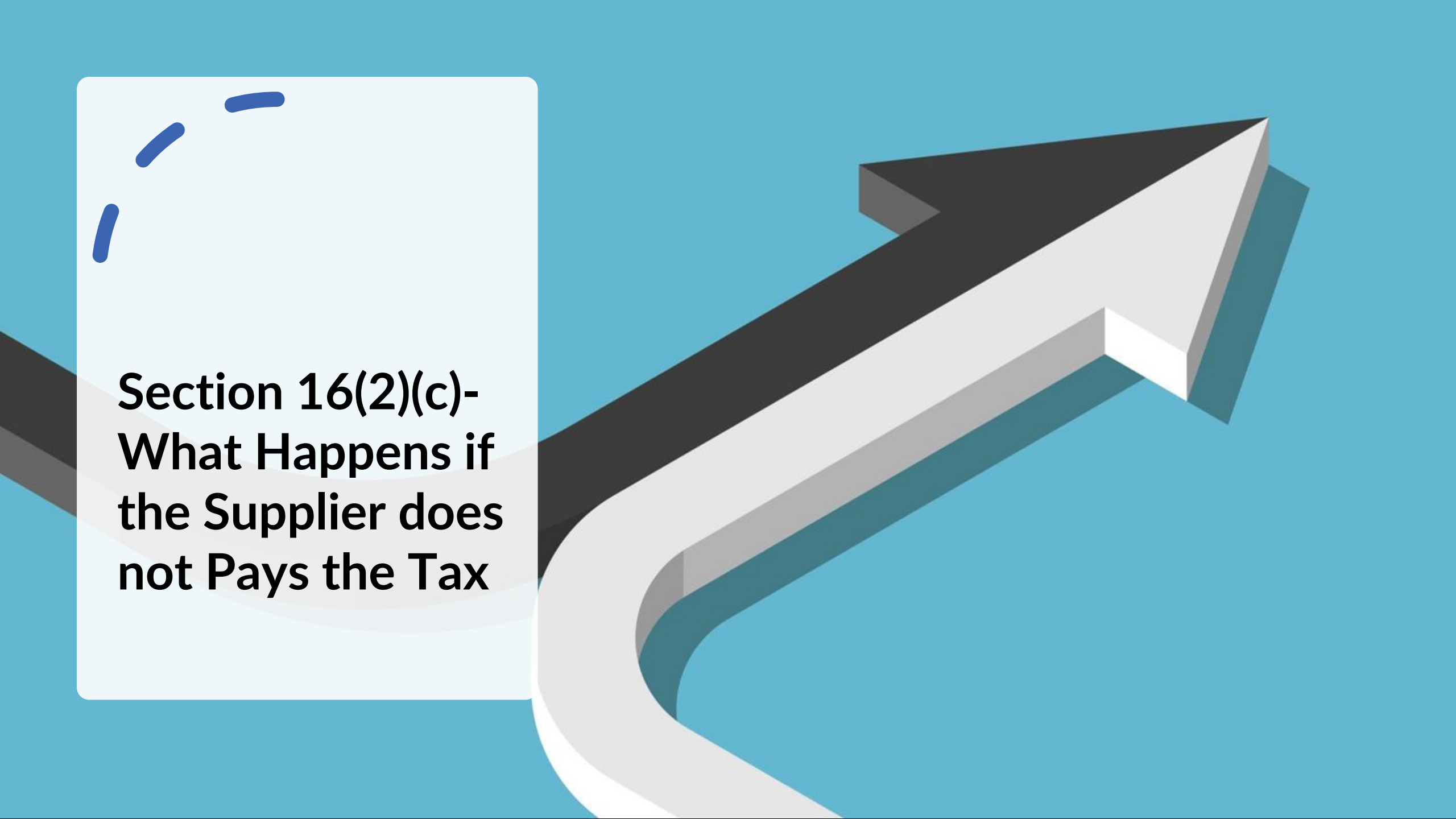
A learned single Judge of Hon'ble Gujarat High Court in **Devi Datt v. Union of India,** *AIR 1985 Delhi 195 held that though the language of Rule 102 of the Displaced Persons (Compensation and Rehabilitation) Rules, 1955 was wider in its ambit and covered the properties comprised in the compensation bill and entrusted to a managing officer for management, "but obviously the said rule has to be construed in the light of the parent Section and it cannot be construed as enlarging the scope of* **Section 19** *itself.*

It is a well settled canon of construction that the Rules made under a statute must be treated exactly as if they were in the Act and are of the same effect as if contained in the Act. There is another principle equally fundamental to the rules of construction, namely, that the Rules shall be consistent with the provisions of the Act. Hence, Rule 102 has to be construed in conformity with the scope and ambit of **Section 19** *and it must be ignored to the extent it appears to be inconsistent with provisions of* **Section 19***".*

Bimal Chandra Banerjee v. State of M.P. and Ors., *(1971) 81 ITR 105, Hegde J.*

"No tax can be imposed by any bye- law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.

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 has 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 to 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.

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.

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

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.

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

Where the eligible ITC claimed by the taxpayer in FORM GSTR-3B is less that 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**
- 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.**
- **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 Joharvs. 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; ShayaraBano 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.**
- 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*

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

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 pat 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.

Payment of Interest under Section 50(3) of CGST Act, 2017

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

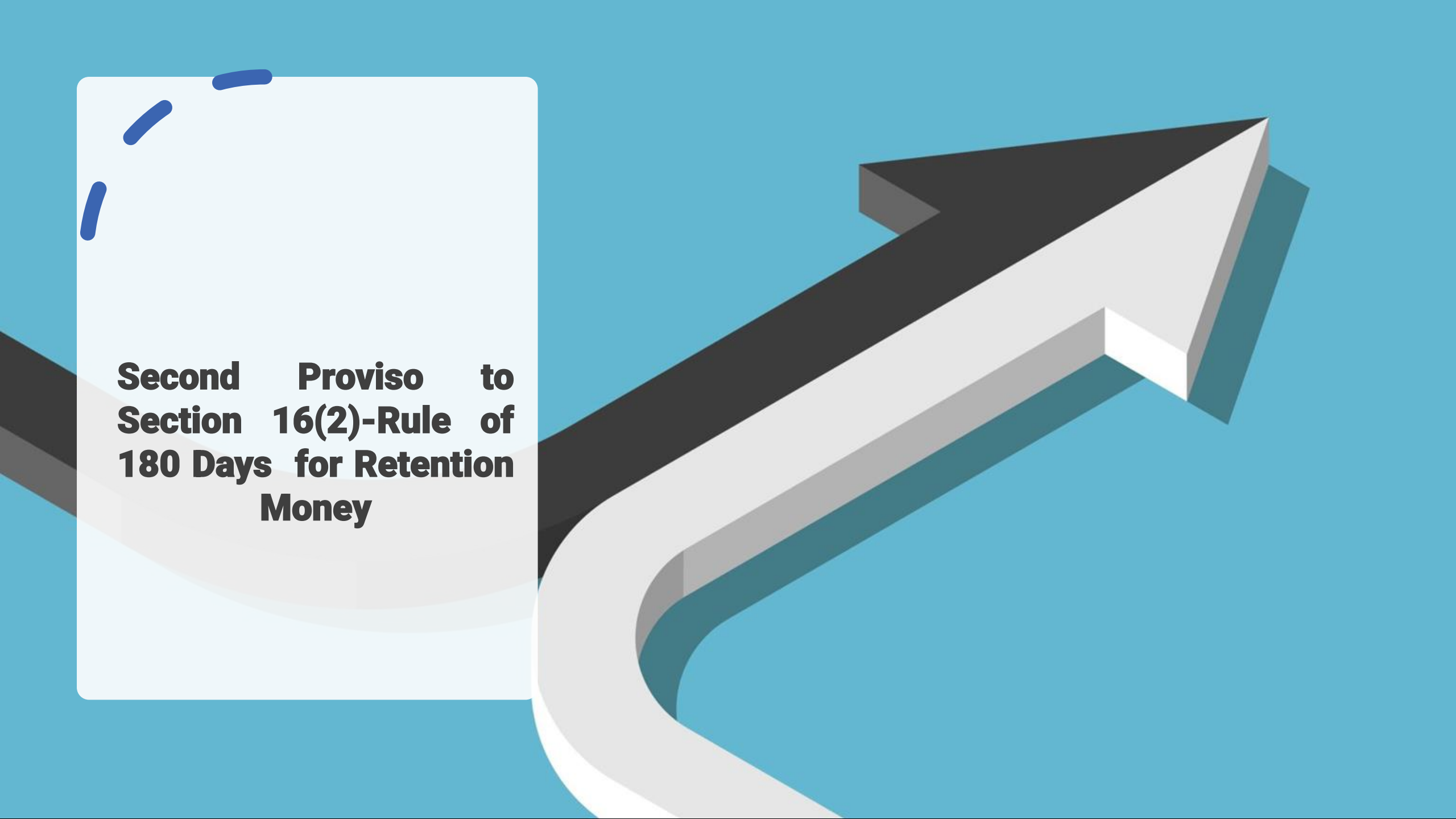
Argument-4-Rule 69 of CGST Rules provide that matching under Section 42 of CGST Act, 2017 of Details of Inward Supply should be extended if the due date of filing of GSTR-2 under section 38 has been extended

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.

Second Proviso to Section 16(2)-Rule of 180 Days for Retention Money



Second Proviso to Section 16(2)-Condition for 180 Days Payment

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:

Part-I-Waiver of Performance shall be deemed to be Performed

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.
(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.
(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.
(d) A owes B, under. a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.
(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B"s demand.

Part-2-Retention Money-Is this in the nature of Deposit

It is holding of an amount towards completion of the contract as deposit treating that amount towards invoice being paid with the consent of the supplier and thus provisions of second proviso to Section 16(2) of CGST Act, 2017 being treated as complied.

Part-3-Doctrine of Impossibility

Once the supplier himself has waived off the right to receive the payment, then asking the recipient to pay the invoice within 180 days of the invoice is asking the recipient to do the impossible.

Part-4-The amount shall be treated as due when the retention money becomes payable

Since the right to claim payment in case of retention arises at the time of satisfaction of the condition as per the contract and not from the date of raising of the invoices, therefore the period of 180 days shall be calculated from the date when the payment of retention money becomes due and not from the date of invoice.

Commissioner Of Income-Tax vs Simplex Concrete Piles (India) ... on 5 December, 1988 Equivalent citations: 1989 179 ITR 8 Cal wherein it was held by the hon'ble Court that the payment of retention money is deferred and is contingent on the satisfactory completion of the work and removal of defects and payment of damages, if any. Till then, there is no admission of liability and no right to receive any part of the retention money accrues to the assessee.

INPUT TAX CREDIT : CA ARPIT HALDIA

Part 5-Government illegally witholding the money even when the same has been deposited

That the provision are ultra vires per se as tax in the instant case has already been deposited with the Government and the Government is disallowing the Input Tax Credit citing superficial reasons even in cases wherein both the supplier and recipient have agreed for a payment beyond the stipulated time period of 180 days.

Part 6-Retention money has been withheld with the consent of the supplier and amount paid by us to the supplier is more than the entire tax amount of the entire invoice, therefore it should be treated that we have complied with the provision of payment to the supplier within 180 days of the issue of the invoice.

Hindustan Zinc Limited [(2014) 34 S.T.R. 440 (Tri-Del) has held that Rule 4(7) would be applicable only in a situation where the service provider has issued the invoice but he has not paid the service tax. But where there is no dispute that service tax has been paid by the service provider on the full invoice value, even though he has not received full payment from the service recipient and part of the payment due to him has been withheld by the service recipient due to some reason, this rule would not be applicable.

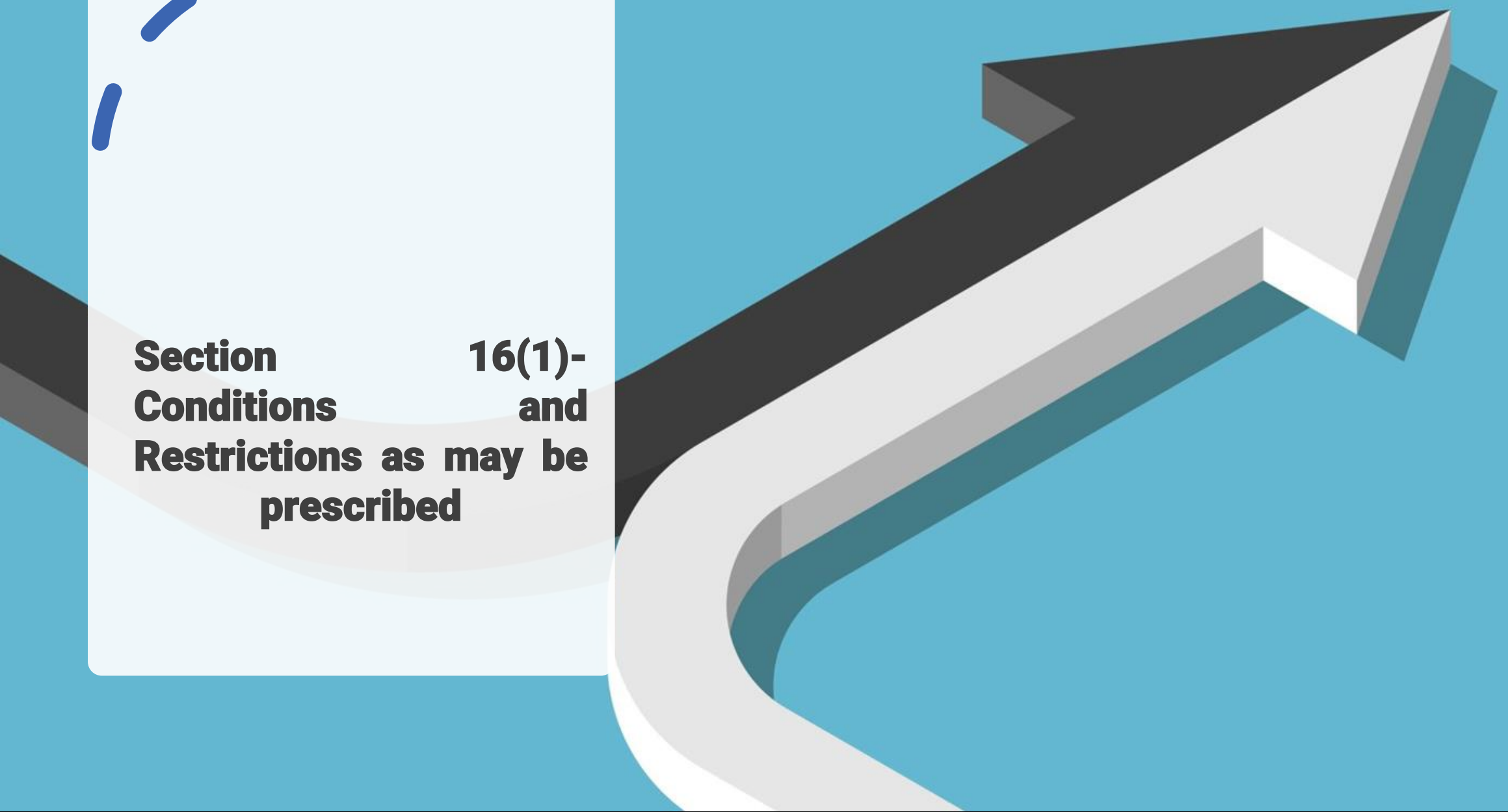
Budget Amendment- Finance Act, 2022- Substituion of Section 38 of CGST Act, 2017

Part	Section	Brief	Amendment	Impact	Amendment proposed, along with rationale (As per 43rd GST Council Meeting)
I	16	**Eligibility and conditions for taking Input Tax Credit**	*In the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the Central Goods and Services Tax Act), in section 16, --* *(a) in sub-section (2),--* *(i) after clause (b), the following clause shall be inserted, namely:--* *"(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;";*	Amendment to 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,— *"(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;";*	*(ii) Available data suggests that the percentage of filing of return in FORM GSTR-1 (details of outward supplies) is far lesser as compared to filing of return in FORM GSTR3B, through which input tax credit is availed. Further, due to poor filing of FORM GSTR-1, there are large gaps between credit available under FORM GSTR-2A and selfassessed credit under FORM GSTR-3B. Further, reasonable restriction had already been imposed on self-assessed input tax credit (ITC) availed in FORM GSTR-3B on the basis of credit reflected in FORM GSTR-2A/2B in terms of Rule 36(4). It provides that credit availed in GSTR-3B cannot exceed the credit reflected in GSTR-2A by 20%, w.e.f. 09.10.2019; and which was further reduced to 10% from w.e.f 01.01.20202 and 5% w.e.f. 01.01.2021.* *(iv) Thereafter, amendment has been proposed in section 38, which, inter-alia, provides that details of outward supplies furnished by the suppliers that are to be communicated to the recipients may be restricted in specified cases.* ***Accordingly, it is proposed to provide in law that the recipient shall not be eligible for ITC corresponding to such details which have not been communicated for which clause (e) is proposed to be added in section 16(2).***
II	16	**Eligibility and conditions for taking Input Tax Credit**	*In the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the Central Goods and Services Tax Act), in section 16, --* *(ii) in clause (c), the words, figures and letter "or section 43A" shall be omitted;*	(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.	

Part	Section	Brief	Amendment	Amendment proposed, along with rationale (As per 43rd GST Council Meeting)
X	38	**Old section for furnishing of inward supplies in GSTR-2 has been scrapped.** **New sections lays down additional condition for claiming of ITC other than section 16 and claim of ITC as per auto-drafted GSTR-2B**	**103. For section 38 of the Central Goods and Services Tax Act, the following section shall be substituted, namely:--** *"38. (1) The details of outward supplies furnished by the registered persons under sub-section (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* *(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 subsection 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.".*	i. The present sub-sections to be omitted in entirety as there is no requirement of furnishing details of inward supplies by the taxpayer. ii. The new section to provide that details of inward supplies shall be made available to the recipients in a prescribed manner. This is essentially an enabling provision to provide for **GSTR-2B**. The requirement of reversal of input tax credit arises from Chapter V, and is, therefore, not required to be mentioned under this section. iii. Further, provision to implement spike rules is incorporated in sub-section (2). Rule 60(7)- (7) An auto-drafted statement containing the details of input tax credit shall be made available to the registered person in FORM GSTR-2B, for every month, electronically through the common portal, and shall consist of—

Judgement	Judgements in Favour	Judgement Against
LGW Industries Limited & Ors. Vs Union of India & Ors. (Calcutta High Court)	1) Commissioner of C. Ex. East Singhbhum v. Tata Motors Ltd. reported in 2013 (294) ELT 394 (Jhar). 2) R.S. Infra-Transmission Ltd. v. State of Rajasthan through its Secretary, Ministry of Finance in Civil Writ Petition No.12445/2016 passed by the High Court of Rajasthan Bench at Jaipur. 3) Commissioner of Trade & Taxes, Delhi & 66 Ors. v. Arise India Limited & Ors. reported in TS-2 SC-2018-VAT. 4) On Quest Merchandising India Pvt. Ltd. v. Government on NCT of Delhi, reported in TS314-HC 2017 (Del)-VAT; 2018 (10) GSTL. 182 (Del); 5) M/s. Tarapore & Company, Jamshedspur v. The State of Jharkhand in W.P.(T) No. 773 of 2018 passed by Jharkhand High Court; 6) Gheru Lal Bal chand v. State of Haryana reported in (2011) 45 VST 195 (P&H); 7) D.Y. Beathel enterprises v. State Tax Officer (Data Cell) Tiruneveli reported in (2021) 127 Taxman. Com 80 (Madras); 8) Taparia Overseas (P) Ltd. v. Union of India reported in 2003 (161) E.L.T. 47 (Bom); 9) Prayagaj Dying & Printing Mills Pvt. Ltd. v. Union of India reported in 2013 (290) ELT 61 (Guj); 10) Star Plastic Industries v. Additional Commissioner of Sales Tax (Appeal) & Ors. reported 2021 SC OnLine Ori 1618; and 11) State of Maharashta v. Suresh Trading Company reported in (1998) 109 STC 439 (SC).	1) P.R. Mani Electronics v. Union of India reported in 2020 TIOL-1198 HC Mad GST; 2) ALD Automotive Pvt. Ltd. v. The Commercial Tax Officer, reported in 2019 (13) SCC 225; 3) Jayram & Co. v. Assistant Commissioner & Ors. reported in 2016 (15) SCC 125; 4) Godrej & Boycentg & Co. Pvt. Ltd. v. GST reported in 1992 (3) SCC 624; 5) TVS Motors v. State of Tamil Nadu reported in 2019 (13) SCC 403; 6) Collector of Ex Commissioner v. Douba Cooperative Sugar Mills Ltd. reported in 1988 (37) ELT-478; and 7) D.Y. Bethal Enterprise v. The State Tax Officer (Data Cell) in W.P. (MD) No.2127 of 2021.

Section 16(1)- Conditions and Restrictions as may be prescribed



Section 16(1)-Conditions Prescribed/Notified

(87) "prescribed" *means prescribed by rules made under this Act on the recommendations of the Council;*

(80) "notification" *means a notification published in the Official Gazette and the expressions "notify" and "notified" shall be construed accordingly;*

Section 16. Eligibility and conditions for taking input tax credit.-

(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 166. Laying of rules, regulations and notifications.-

Every rule made by the Government, every regulation made by the Board and every notification issued by the Government under this Act, shall be laid, as soon as may be after it is made or issued, before each House of Parliament, *while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or in the notification, as the case may be, or both Houses agree that the rule or regulation or the notification should not be made, the rule or regulation or notification, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.*

Vasu Dev Singh & Ors vs Union Of India & Ors on 7 November, 2006

We, at the outset, would like to express our disagreement to the contentions raised before us by the learned counsel appearing on behalf of Respondents that the impugned notification is in effect and substance a conditional legislation and not a delegated legislation. The distinction between conditional legislation and delegated legislation is clear and unambiguous. **In a conditional legislation** the delegatee has to apply the law to an area or to determine the time and manner of carrying it into effect or at such time, as it decides or to understand the rule of legislation, it would be a conditional legislation. The legislature in such a case makes the law, which is complete in all respects but the same is not brought into operation immediately. **The enforcement of the law would depend upon the fulfilment of a condition and what is delegated to the executive is the authority to determine by exercising its own judgment as to whether such conditions have been fulfilled and/or the time has come when such legislation should be brought in force. The taking effect of a legislation, therefore, is made dependent upon the determination of such fact or condition by the executive organ of the Government. Delegated legislation, however, involves delegation of rule making power of legislation and authorises an executive authority to bring in force such an area by reason thereof. The discretion conferred on the executive by way of delegated legislation is much wider. Such power to make rules or regulations, however, must be exercised within the four corners of the Act.** Delegated legislation, thus, is a device which has been fashioned by the legislature to be exercised in the manner laid down in the legislation itself. By reason of Section 3 of the Act, Administrator, however, has been empowered to issue a notification whereby and whereunder, an exemption is granted for application of the Act itself.

Hamdard Dawakhana (Wakf) Lal Kuan, Delhi & Anr. vs. Union of India & Ors. [(1960) 2 SCR 671

"The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; Hampton & Co. v. U.S. (276 U.S. 394) and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend;"

Section 17(3) and Section 17(2)-Value of Exempt Supplies

Second Proviso to Section 16(2)-Condition for 180 Days Payment

Section 17. Apportionment of credit and blocked credits.–

*(2) Where the goods or services or both are used by the registered person **partly for effecting taxable supplies including zero-rated supplies under this Act** or under the Integrated Goods and Services Tax Act and **partly for effecting exempt supplies under the said Acts, the amount of credit** shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.*

*(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.*

Rule 6 of CENVAT Credit Rules, 2004

"Explanation 3.—For the purposes of this rule, **exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994**, provided that such activity has used inputs or input services.

Explanation 4.—**Value of such an activity as specified above in Explanation 3,** shall be the invoice/agreement/contract value and where such value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Finance Act, 1994 and the rules made thereunder."

Intercontinental Consultants and Technocrats (P.) Ltd. v. Union of India W.P. (C) No. 6370 (Delhi) of 2008, dated 30-11-2012

Issue-Can Rule 5(1) override Sec. 67 which provides for levy on only gross amount charged.

Rule 5(1) was amended to include reimbursement as part of value for the purpose of charging service tax. Sec. 67 authorized determination of value of taxable service for the purpose of charging service tax under Section 66 as gross amount charged by service provider for such service provided or to be provided by him, in a case where the consideration for the service is money.

Hon. Court held as under:

"We have no hesitation in ruling that Rule 5 (1) which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is ultra vires Section 66 and 67 and travels much beyond the scope of those sections. To that extent it has to be struck down as bad in law. The expenditure or costs incurred by the service provider in the course of providing the taxable service can never be considered as the gross amount charged by the service provider "for such service" provided by him."

Section 17(5)(h) and Schedule I of CGST Act, 2017

SCHEDULE I ACTIVITIES TO BE TREATED AS SUPPLY EVEN IF MADE WITHOUT CONSIDERATION

Activities specified in Schedule I, made or agreed to be made without a consideration

1. **Permanent transfer or disposal of business assets where input tax credit has been availed on such assets.**

Section 17(5)(h)

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

namely:—

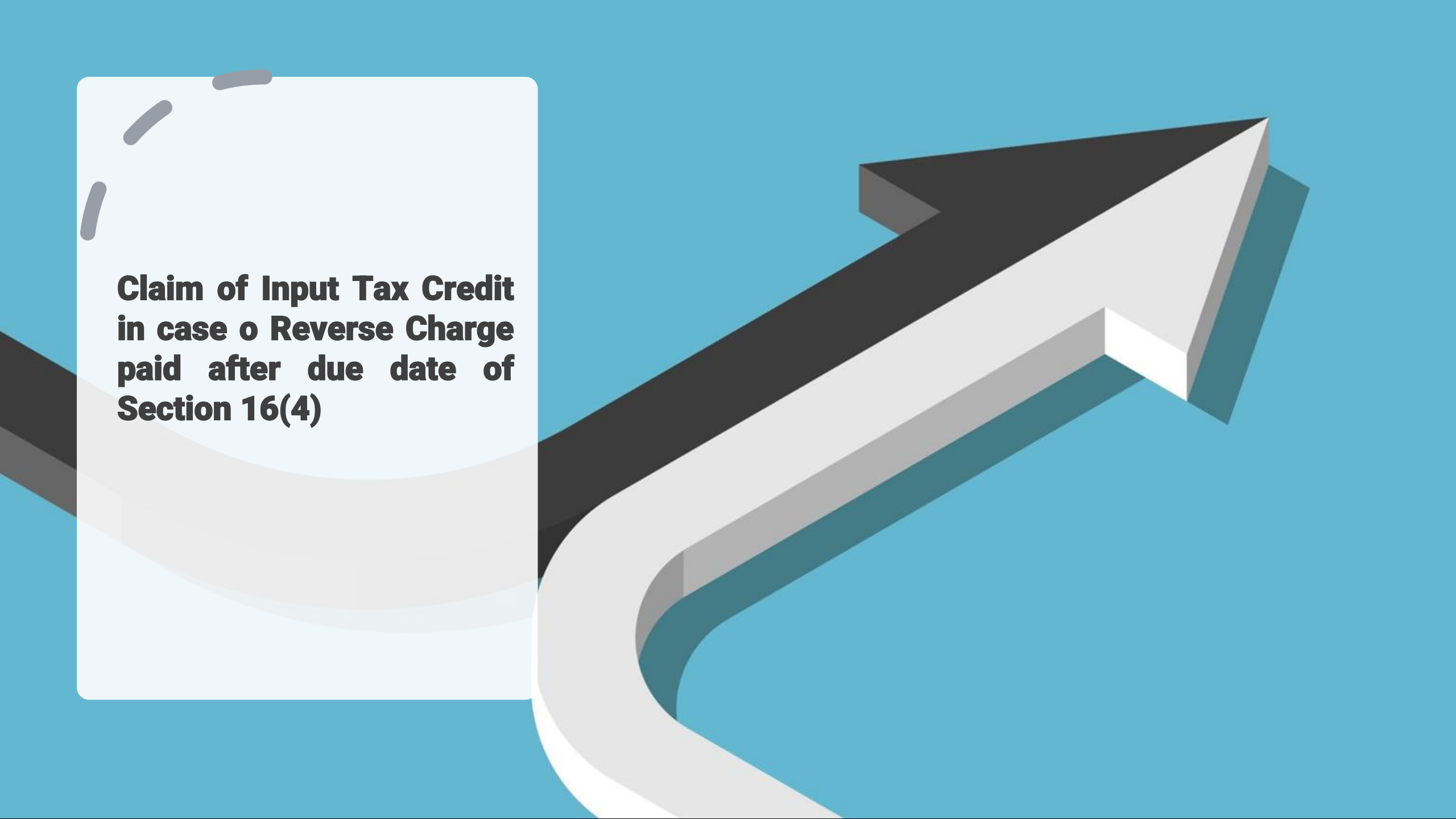
(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;

Circular No. 92/11/2019-GST

Free samples and gifts:

Thus, it is clarified that input tax credit shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration. However, where the activity of distribution of gifts or free samples falls within the scope of "supply" on account of the provisions contained in Schedule I of the said Act, the supplier would be eligible to avail of the ITC.

Claim of Input Tax Credit in case o Reverse Charge paid after due date of Section 16(4)



Section 16 read with Rule 36

Section 16. Eligibility and conditions for taking input tax credit.-

(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;

Definition of Invoice-Section 2(66)

(66) "invoice" or "tax invoice" means the tax invoice referred to in section 31;

Rule 36. Documentary requirements and conditions for claiming input tax credit.-

(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,-

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;

(a) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;

Section 16(4)

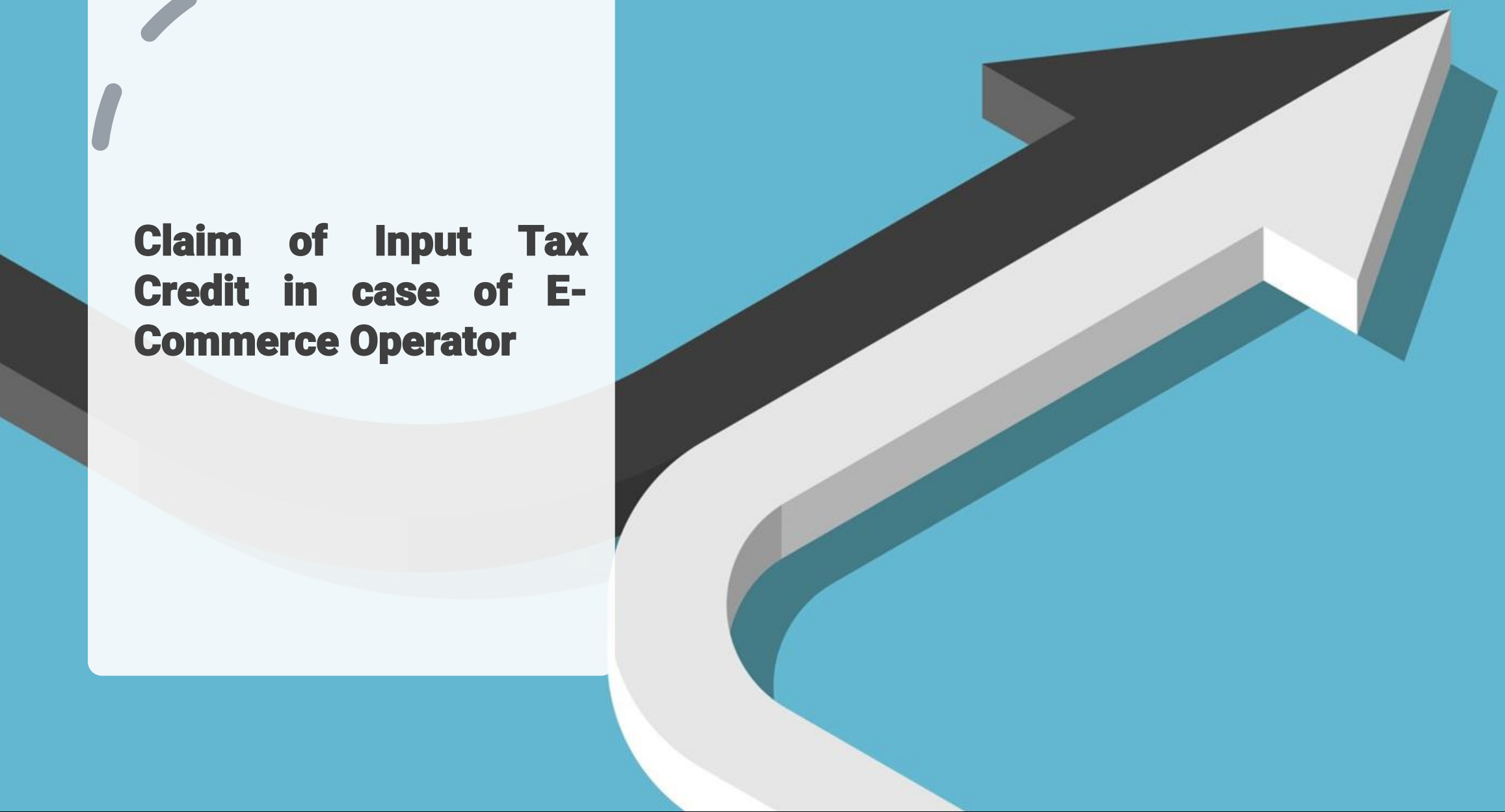
(4) A registered person shall not be entitled to take input tax credit in respect **of any invoice or debit note** for supply of goods or services or both after the [6][thirtieth day of November] following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Section 31(3)(f)

(3) Notwithstanding anything contained in sub-sections (1) and (2)-

(f) a registered person who is liable to pay tax under sub-section (3) or subsection (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both;

Claim of Input Tax Credit in case of E-Commerce Operator



Section 16 read with Rule 36

Section 9(5)

*5) The Government may, on the recommendations of the Council, by notification, specify categories of services the **tax** on intra-State supplies of **which shall be paid by the electronic commerce operator** if such services are supplied through it, and **all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:***

Section 9(3)

*(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the **tax** on **which shall be paid on reverse charge basis by the recipient** of such goods or services or both and **all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.***

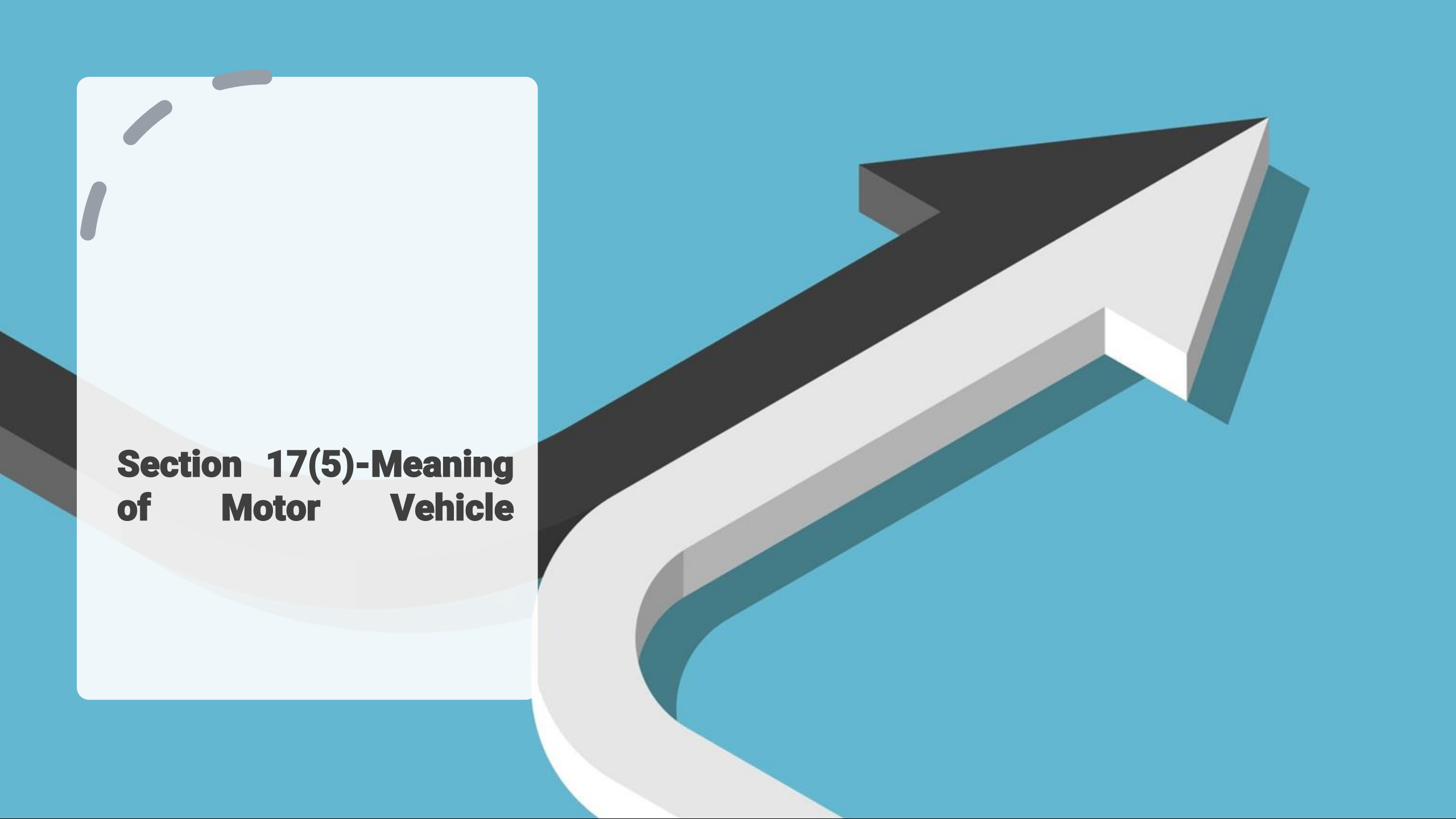
Section 16(1) of the CGST Act, 2017 provides that *"**Every registered person shall**, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax.."*. .

As per the provision of Section 2(47), exempted supply has been defined as a supply which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply.

Section 17(3) of CGST Act, 2017

(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.

Section 17(5)-Meaning of Motor Vehicle



Meaning of the Term “Motor Vehicle”

Meaning of the Term “in respect of”

Tolaram Relumal And Another vs The State Of Bombay on 13 May, 1954 Equivalent citations: 1954 AIR 496, 1955 SCR 439-Giving the words " in respect of " their widest meaning, viz., " relating to " or " with reference to", it is plain that this relationship…

M/s Swastik Tobacco Factoryvs State of Madras-On perusal of the above rule, The Supreme Court was of the view that Indian tax laws use the expression “in respect of” as synonymous with the expression “on”. The reference of article 288 of the Constitution of India, section 3 of the Indian Income-tax Act, 1922, sections 3(2) and 3(5), second proviso, of the Madras General Sales Tax Act, 1939; section 3(1A) of the Central Excises and Salt Act, 1944; and section 9 of the Kerala Sales Tax Act was given by The Supreme Court in this regard. It was held that the expression “in respect of the goods” means only”on the goods”.

GST FAQ on Mining Sector

Q. No. 21:- Will GST charged on purchase of all earth moving machinery including JCB, tippers, dumpers by a mining company be allowed as input credit?

Answer: – The provision of Sec. 17(5) (a) of the CGST Act, 2017 restricts credit on motor vehicle for specified purposes listed therein. Further, in terms of the provision of Section 2(76) of the CGST Act, 2017 the expression ‘motor vehicle’ shall have the same meaning as assigned to it in Clause (28) of Section 2 of the Motor Vehicle Act, 1988, which does not include the mining equipment, viz., tippers, dumpers. Thus, as per present provisions, the GST charged on purchase of earth moving machinery including tippers, dumpers used for transportation of goods by a mining company will be allowed as input credit.”

The Motor Vehicles Act, 1956 defined Motor Vehicles in the following words:–

“motor vehicle” means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special, type adapted for use only in a factory or in any other enclosed premises.

Ms.Vijaya Traders V/s the Commercial Tax Officer-I, Kadapa And others-(AP HC)

The general tests to be applied, as culled out from the MV Act and Rules made thereunder as well as the decided cases are the following.

(i) Every vehicle adapted for use upon roads is motor vehicle;

(ii) If any vehicle is registered under Chapter VI of the MV Act, and is required to obtain approvals and fitness certificates thereunder, it would lead to an inference that it is a motor vehicle;

(iii) When a vehicle is adapted for use upon roads even though it is not driven on the public roads or in a public place and it cannot be driven without obtaining licence, it is certainly a motor vehicle;

(iv) The word 'adapted' in Section 2(28) of the MV Act has to be read as suitable for use on the roads. The mere fact that they are such which do not move on the roads by reason of their weight or slow movement, does not mean that they are not suitable for use on roads. Whether or not it moves on the roads if it is suitable to move on the roads, it is a motor vehicle;

(v) Merely because a motor vehicle is put to a specific use, such as being confined to enclosed premises will not render the same to be a different kind of vehicle. The steering system, rear lights, direction indicators, rear view mirror, front screen viper, horns, brakes, parking brakes etc are some of the factors which may have to be considered before drawing appropriate inferences; and

(vi) The question whether any motor vehicle has entered into local area to attract tax under the entry tax Act ordinarily will have to be dealt within order passed in the course of assessment.

Meaning of the Term “Motor Vehicle”-Press Release by the Government

Road Ministry advises States to not to insist upon Registration/Driving Licence for Road Building and Rehabilitation equipments and Heavy Earth Moving Machineries. Posted On: 13 JUL 2020 8:37PM by PIB Delhi

Ministry of Road Transport and Highways has clarified that the heavy road making machinery is not a motor vehicle, and is not covered under MV Act. The Ministry has requested the States and UTs to not to insist upon registration and driving licence for these machines.

In a letter addressed to the Transport departments of all the States and UTs, the Ministry has informed that it has received a number of representations regarding Road Building and Rehabilitation Equipment, wherein concern regarding registration of cold recycling machines and soil stabilization machine (road building and rehabilitation equipment) under Central Motor Vehicle Rules (CMVR), 1989 has been raised.

The representations have clarified that Cold milling machines are used to salvage the crust of the existing bituminous pavement to recover the asphalt material and re-use them to conserve aggregate and bitumen and save the associates costs of mining and crushing. Also the extracted bitumen leads to saving of bituminous thus saving of forex.

Also, the work awarded to the concessionaire by the employer is within a given range of chainage. Therefore, these equipment work in a defined region. Further, the operating speed of the above mentioned equipment is 5-10 kmph and these equipment are deployed at the work site through trailers.

The representation regarding Heavy Earth Moving Machineries (HEMM) - wherein concern regarding registration of HEMM equipment and their operation has been raised. HEMM such as Dumpers, Payloaders, Shovels, Drill Master, Bulldozers, Motor Grader and Rock breakers are also categorised as "OFF THE ROAD" operated and maintained within mine boundary under sole management, supervision and control of Mines Manager and never used outside mine boundary.

The Ministry said, the issue had been discussed in the 56th meeting of the CMVR-TSC wherein it was opined that cold milling machine, cold recycler and soil stabilizers are not covered under the definition of the Motor Vehicles Act, 1988 and that the type approval of the machine is also not made.

On the similar lines HEMM such as Dumpers, Payloaders, Shovels, Drill Master, Bulldozers, Motor Grader and Rock breakers are not covered under the definition of the Motor Vehicles Act, 1988 and may not be insisted for registration under the Motor Vehicles Act, 1988.

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;

(c) 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.

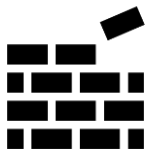
Explanation.—For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

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.



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.

THANK YOU

CA DR ARPIT HALDIA

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