

FINER ISSUES IN ITC INCLUDING CRITICAL CHECKPOINTS

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Agenda

- Legal provisions – overview
- ITC – nature of the right
- Entitlement – who, what, where, how & why
- Eligibility – Conditions
- Limitation – Time limits
- Restrictions – Block credits
- Imposition of interest – Situations & manner of computation
- Critical checkpoints

Legal provisions – overview

Scheme of the Act

- Chapter V of the CGST Act, 2017 contains provisions related to ITC
 - Sec. 16 - Eligibility and conditions for taking input tax credit
 - Sec. 17 - Apportionment of credit and blocked credits
 - Sec. 18 - Availability of credit in special circumstances
 - Sec. 19 - Taking input tax credit in respect of inputs and capital goods sent for job work
 - Sec. 20 - Manner of distribution of credit by Input Service Distributor
 - Sec. 21 - Manner of recovery of credit distributed in excess

Rules

- Chapter V of the CGST Rules, 2017 contains provisions related to ITC

Rule	Content
Rule 36	Documentary requirements and conditions for claiming input tax credit
Rule 37	Reversal of input tax credit in the case of non-payment of consideration
Rule 38	Claim of credit by a banking company or a financial institution
Rule 39	Procedure for distribution of input tax credit by Input Service Distributor
Rule 40	Manner of claiming credit in special circumstances
Rule 41	Transfer of credit on sale, merger, amalgamation, lease or transfer of a business
Rule 41A	Transfer of credit on obtaining separate registration for multiple places of business within a State or Union territory
Rule 42	Manner of determination of input tax credit in respect of inputs or input services and reversal thereof
Rule 43	Manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases
Rule 44	Manner of reversal of credit under special circumstances
Rule 44A	Manner of reversal of credit of Additional duty of Customs in respect of Gold dore bar
Rule 45	Conditions and restrictions in respect of inputs and capital goods sent to the job worker

ITC – nature of the right

History

Godrej and Boyce Mfg. Co. Pvt. Ltd. and Others v. CST (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 set-off is itself a boon or a concession. It was open to the rule making authority to provide for a small abridgment or curtailment while extending a concession.

Eicher Motors Ltd. v. UOI (1999) 106 ELT 3 (SC)

- As pointed out by us that when on the strength of the rules available certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the scheme under which the duty had been paid on the manufactured products and if such a situation is sought to be altered, necessarily it follows that right, which had accrued to a party such as availability of a scheme, is affected and, in particular, it loses sight of the fact that provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessee concerned.
- CCE v. Dai Ichi Karkaria Ltd. (1999) 112 ELT 353 (SC)

History

Ichalkaranji Machine
Centre Pvt. Ltd. v. CCE
(2004) 174 ELT 417 (SC)

- The object of the Modvat scheme was to reduce cost of final product by taking credit for the duty paid on the inputs.

Jayam and Company v.
Asst. Comm. (2016) 15 SCC
125 (SC)

- 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 its a concession granted by virtue of Section 19.

State of Karnataka v. M.K.
Agro Tech.(P) Ltd., (2017)
16 SCC 210 (SC)

- 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. v.
CTO 2018 (364) ELT 3 (SC)

- The above decision (*Jayam and Company*) is a clear authority with proposition that Input Tax Credit is admissible only as per conditions enumerated under Section 19 of the Tamil Nadu Value Added Tax Act, [2006]

ITC – nature of the right

- The right recognized by the GST laws and not flowing directly from the Constitution of India
- Appears to be in the nature of a statutory right and not a constitutional right
- A statutory right can be enforced subject to the fulfilment of the conditions resulting in the existence of the said right
- In case of a conflict with a Constitutional right, the latter shall prevail
 - Article 14, 19, 21
- The conditions resulting in the statutory right are required to be interpreted keeping the object behind vesting of the said right

Object

The approach under GST must be different

CGST Bill, 2017

- STATEMENT OF OBJECTS AND REASONS

- The present tax system on goods and services is facing certain difficulties as under—

- (i) there is cascading of taxes as taxes levied by the Central Government are not available as set off against the taxes being levied by the State Governments;

- The proposed legislation will simplify and harmonise the indirect tax regime in the country. It is expected to reduce cost of production and inflation in the economy, thereby making the Indian trade and industry more competitive, domestically as well as internationally. Due to the seamless transfer of input tax credit from one stage to another in the chain of value addition, there is an in-built mechanism in the design of goods and services tax that would incentivise tax compliance by taxpayers. The proposed goods and services tax will broaden the tax base, and result in better tax compliance due to a robust information technology infrastructure.

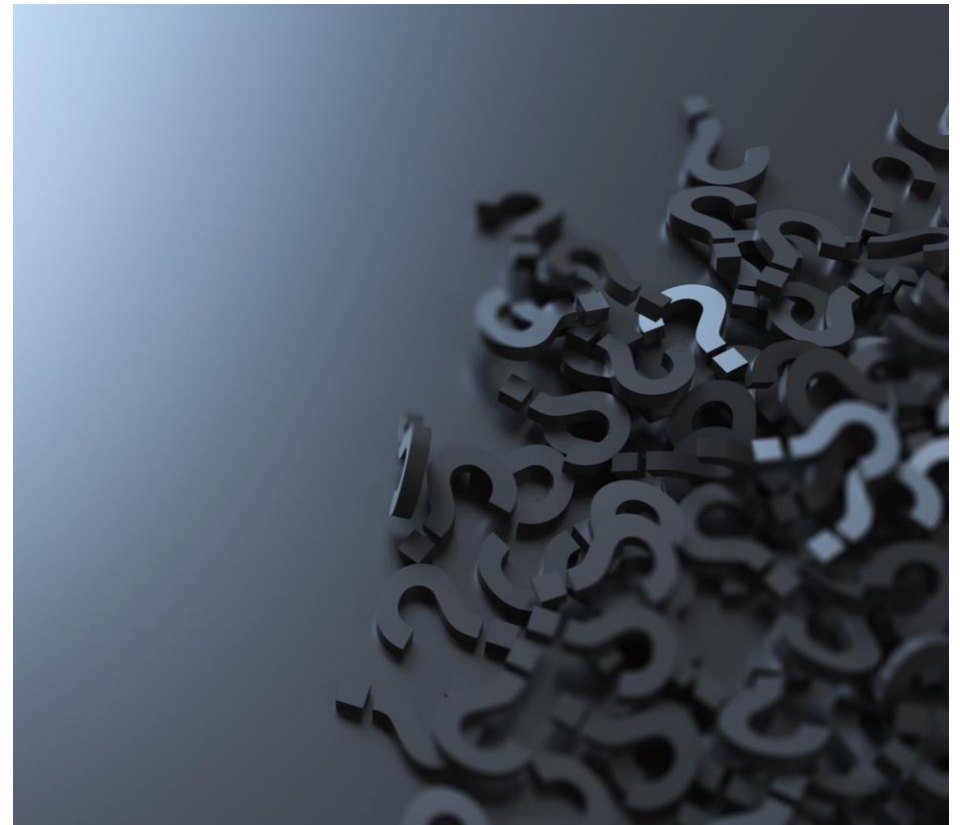
- The Central Goods and Services Tax Bill, 2017, inter alia, provides for the following, namely:—

- (b) to broad base the input tax credit by making it available in respect of taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business;

Entitlement – who, what, where, how &
why

ENTITLEMENT - WHO

- Sec. 16(1) of the CGST Act, 2017
 - 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.
- Sec. 2(94) “registered person” means a person who is registered under section 25 but does not include a person having a Unique Identity Number;



CLAIMING ITC IS AN OPTION

- Entitled to take.
- Cross referencing with Sec. 17 of the CGST Act, 2017.

ENTITLEMENT - WHAT

Sec. 2(62) of the CGST Act, 2017

“input tax” in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes —

- (a) the integrated goods and services tax charged on import of goods;
- (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9;
- (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;
- (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or
- (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,

but does not include the tax paid under the composition levy;

ENTITLEMENT - WHAT

- Sec. 16(1) “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”
- Input tax charged
- Sec. 2(17) “business” includes —
 - (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
 - (b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
 - (c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

ENTITLEMENT - WHAT

- State of Travancore Cochin v. Shanmugha Vilas Casheanut Factory AIR 1953 SC 333
 - The word “course” conveys the idea of a gradual and continuous flow, an advance, a journey, a passage or progress from one place to another.
- Md. Yusuf v. D. AIR 1968 Bom 112
 - “In the course of business” means in the way that business (which may be of a purely private or trivial nature) is conducted.
- CIT v. Malyalam Plantations 53 ITR 140 (SC)
 - The expression “for the purpose of the business” is wider in scope than the expression “for the purpose of earning profits”. Its range is wide: it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery; it may include measure for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile titles; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business.

ENTITLEMENT - WHAT

- Coca Cola India Pvt. Ltd. 2009 (242) E.L.T. 168 (Bom.)
 - The expression Business is an integrated/continuous activity and is not confined restricted to mere manufacture of the product. Therefore, activities in relation to business can cover all the activities that are related to the functioning of a business.
 - The definition of input service employs the phrase activity relating to business. The words relating to further widens the scope of the expression activities relating to business.
 - Service tax is destination based consumption tax (See All India Federation of Tax Practitioners v. Union of India - 2007 (7) S.T.R. 625 (S.C.)) and is a value added tax with tax burden on ultimate consumer and not manufacturer or service provider.
 - Service tax paid on advertisements, sales promotion and market research admissible as credit for payment of excise duty on concentrate particularly when such expenses form part of price of final product on which excise duty is paid.

ENTITLEMENT - WHAT

- Intent means to have in one's mind as a purpose or a goal.
- It is therefore a state of mind which can never be proved as a fact but can only be inferred from the facts which are proved.
- Steel Authority of India Ltd. v. CCE (1996) 5 SCC 484
 - The expression “intended for use” as occurring in the exemption notification would mean that the raw naphtha was ‘intended for use’ in the manufacture of fertilizer and not that it was actually used for the same.

ENTITLEMENT - WHERE

- Sec. 16(1) -the said amount shall be credited to the electronic credit ledger of such person

ENTITLEMENT - HOW

- Sec. 41(1) - Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to avail the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited to his electronic credit ledger. (Substituted vide The Finance Act, 2022, dated 30.03.2022, w.e.f. 01.10.2022 [effective date notified vide Notification No. 18/2022 - Central Tax, dated 28.09.2022])
- Sec. 42, 43 & 43A omitted vide The Finance Act, 2022, dated 30.03.2022, w.e.f. 01.10.2022

ENTITLEMENT - WHY

- Sec. 49(4) - The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and restrictions and within such time as may be prescribed.
- Conditions and restrictions
 - Manner of utilisation (Sec. 49, 49A & 49B r/w Rule 88A)
 - Conditions of use (Rule 86A)
 - Samay Alloys India Pvt Ltd 2022-VIL-125-GUJ (favourable)
 - N.M.D. Engineering Works 2022-VIL-529-CA (against)
 - Restrictions on use (Rule 86B)

Eligibility – Conditions

CONDITIONS FOR ENTITLEMENT OF THE ITC

- Sec. 16(2) of the CGST Act, 2017
- (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,--

Sec. 16(2)(a)

- (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;
- Rule 36(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](#);
 - (b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;
 - (c) a debit note issued by a supplier in accordance with the provisions of [section 34](#);
 - (d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;
 - (e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of [rule 54](#).
- Rule 36(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document
 - Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.

Sec. 16(2)(aa)

- (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;
 - Inserted vide the Finance Act, 2021, dated: 28.03.2021. Amendment brought into effect w.e.f. 01.01.2022 vide Notification No. 39/2021 - Central Tax dated 21.12.2021

Sec. 16(2)(aa)

- Rule 36(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under sub-section (1) of [section 37](#) unless,-
- (a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility; and
- (b) the details of input tax credit in respect of such invoices or debit notes have been communicated to the registered person in FORM GSTR-2B under sub-rule (7) of rule 60.
- 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.
- Provided further that such condition shall apply cumulatively for the period April, May and June, 2021 and the return in FORM GSTR-3B for the tax period June, 2021 or quarter ending June, 2021, as the case may be, shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.

Sec. 16(2)(b)

- (b) he has received the goods or services or both.
- Explanation.-For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services--
 - (i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;
 - (ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.]

RECEIPT OF GOODS/SERVICES

- CCE vs. Mittal Appliances Limited 2018 (12) G.S.T.L. 297 (M.P.)
 - Difference in Transport Details – if explained, allowable
- Sanvijay Rolling & Engineering Ltd vs. CCE 2018 (11) G.S.T.L. 344 (Bom.)
 - Receipt in one unit, credit taken in another – allowable since revenue neutral
- CCE vs. Good Earth Steel Pvt Ltd 2018 (9) G.S.T.L. 177 (Tri. - All.)
 - Subsequent use in manufacture not questioned, credit allowable.

Sec. 16(2)(ba)

- (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;
 - Inserted vide the Finance Act, 2022, dated: 30.03.2022, w.e.f. 01.10.2022; [Brought into effect from 01.10.2022 vide Notification No. 18/2022 - Central Tax, dated 28.09.2022]

Sec. 16(2)(c)

- (c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and
- Sec. 41 (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to avail the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited to his electronic credit ledger.
- (2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest, by the said person in such manner as may be prescribed:
- Provided that where the said supplier makes payment of the tax payable in respect of the aforesaid supplies, the said registered person may re-avail the amount of credit reversed by him in such manner as may be prescribed.

Sec. 16(2)(d)

- (d) he has furnished the return under section 39

Mismatch with GSTR 2A/2B

- Some judicial decisions:
 - Rectification of GSTR 1
 - Sun Dye Chem v. Asst. Comm. (WP No. 29676 of 2019)(Mad.)
 - Registered supplier should be permitted to rectify GSTR 1 even after the stipulated time limits and the department shall enable the auto-population of the rectified data.
 - Rectification of GSTR 3B
 - Circular No. 26/26/2017-GST dt. 29.12.2017
 - Bharti Airtel Limited (SC)
 - Deepak Print v. Union of India 2021-VIL-197-GUJ
 - ITC cannot be denied only on the ground that the transaction is not reflected in GSTR 2A when tax payment can be confirmed
 - Paramount Enviro Energies v. The State Tax Officer 2021-VIL-550-KER
 - Pentacle Plant Machinerics Pvt. Ltd. v. Office of the GST Council 2021-VIL-193-MAD

Non- payment of tax by supplier

- Pre-GST judicial views
 - Arise India Limited vs Commissioner Of Trade & Taxes [TS-314-HC-2017(Del)-VAT](Del.) (department's SLP dismissed by the Hon'ble Supreme Court [TS-2-SC-2018-VAT])
 - R. S. Infra Transmission Ltd. (CWP No. 12445/2016) (Raj.)

Circular trading

Supply u/s 7(1)(a)

- all forms of supply of goods or services or both such as sale

Recipient u/s 2(93)

- “recipient” of supply of goods or services or both, means —
a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration
- and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

Sale on “as is where is basis”

- Chapter III of the Sale of Goods Act, 1930
- Sec. 19
 - Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
 - For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
- Specific goods in a deliverable state
- Sale of unascertained goods and appropriation

Fake invoicing

Fake invoicing is a menace and needs to be weeded out

Mixed question of law & fact

Relevant provisions and implications

- Sec. 155 - Burden of proof — Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person.
- Sec. 70 – Power to summon persons to give evidence and produce documents
- Sec. 71 - Access to business premises
- Sec. 69 - Power to arrest – Article 21 - Protection of life and personal liberty
- Prosecution
 - Sec. 135 - Presumption of culpable mental state
 - Sec. 136 - Relevancy of statements under certain circumstances
- Sec. 144 - Presumption as to documents in certain cases
- Sec. 145 - Admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence
- Sec. 159 - Publication of information in respect of persons in certain cases

Fake invoicing

- Important points:
 - Burden of proof on the taxpayer
 - Documentation – e.g. transport proof, gate pass, inventory records, E-way bills, toll receipts, weighment receipt, payment through banking channel, etc.
 - Statement – vendor, transporter, etc.
 - Once burden discharged the onus is on the department
 - Once onus discharged, the burden shifts back to the taxpayer
 - Cross examination
 - Doctrine of reasonable expectation (fraud by vendor's or vendor's vendor)
 - Established fraud vitiates everything

Fake invoicing

- Consequences of fake invoicing
 - Whether only ITC shall be recovered ? What about the tax paid on the outward supplies ?
 - Sec. 69 – arrest
 - Sec. 122 – penalty – also on the kingpin
 - Sec. 132 – prosecution – also on the kingpin
 - Sec. 29 read with Rule 21/21A – cancellation/suspension of registration
 - Rule 86A – blocking of the electronic credit ledger
 - Income Tax ?

Fake invoicing
- Circular No.
171/03/2022-
GST
dt.06.07.2022

- **Situation 1 – ‘A’ issues an invoice to ‘B’ without any underlying supply (i.e. fake invoice)**
 - In absence of actual supply, no tax demands can be made from ‘A’. ‘A’ however shall be liable for penalty u/s 112(1)(ii) of the CGST Act, 2017 for committing an offence of issuing the invoice without actual supply.

Fake invoicing
- Circular No.
171/03/2022-
GST
dt.06.07.2022

- **Situation 2 – 'A' issues an invoice to 'B' without any underlying supply (i.e. fake invoice). 'B' avails the ITC based on such a fake invoice. 'B' further issues an invoice with actual supply and utilizes the ITC availed on the fake invoice for payment of legitimate dues on actual supplies.**
 - 'B' shall be liable for demand and recovery of the ITC availed on the fake invoice along with interest and penalty u/s 74 of the CGST Act, 2017. Since penalty has been imposed once, in view of Sec. 75(13) of the said Act, the penalty for the given act cannot again be imposed under any other provisions of law including Sec. 122.

Fake invoicing
- Circular No.
171/03/2022-
GST
dt.06.07.2022

- **Situation 3 – 'A' issues an invoice to 'B' without any underlying supply (i.e. fake invoice). 'B' also avails the ITC based on such a fake invoice and passes to 'C' by issuing an invoice without any underlying supply.**
 - No demand and recovery of either input tax credit wrongly/fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C' is required to be made from 'B' under the provisions of section 73 or section 74 of CGST Act. However, in such cases, 'B' shall be liable for penal action both under section 122(1)((ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods and/or services as also for taking/utilizing input tax credit without actual receipt of goods and/or services.

Fake invoicing
- Circular No.
171/03/2022-
GST
dt.06.07.2022

- **Other aspects**

- The fundamental principles that have been delineated in the above scenarios may be adopted to decide the nature of demand and penal action to be taken against a person for such unscrupulous activity.
- Any person who has retained the benefit of transactions specified under sub-section (1A) of section 122 of CGST Act, and at whose instance such transactions are conducted, shall also be liable for penal action under the provisions of the said sub-section.
- Prosecution provisions u/s 132 can also be invoked in such cases subject to the conditions specified in law as well as the facts and circumstances of the case.

Fake invoicing

International jurisprudence

Optigen Ltd, Fulcrum Electronics Ltd and Bond House Systems Ltd (C-354/03, C-355/03 and C-484/03)

- The right to deduct input value added tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing.

Fake invoicing

Relevant case laws:

Burden of proof

- Ranjeev Alloys Limited 2009 (236) E.L.T. 124 (Tri. - Del.) [Maintained in 2009 (247) ELT 27 (P&H HC)]
- Kanungo & Co. 1983 (13) E.L.T. 1486 (S.C.)
- Sooraj Mull Baijnath Inds. Pvt. Ltd. 2014 (309) E.L.T. 577 (Tri. - Del.)

Evidence

- Agarwal Trading Corporation And Others 1983 (13) E.L.T. 1467 (S.C.)
- Issardas Daulat Ram v. Union of India, (1962) Supp. 1 SCR 358
- Sundesh Springs Pvt. Ltd. 2009 (238) E.L.T. 329 (Tri. - Del.)
- Garima Enterprises (P) LTD. 2005 (182) E.L.T. 106 (Tri. - Del.)
- Motabhai Iron & Steel Industries 2014 (302) E.L.T. 69 (Tri. - Ahmd.) [Affirmed in 2015 (316) ELT 374 (Gujarat High Court)]

Fake invoicing

Vendor commits fraud - Doctrine of reasonable expectation

- R.S. Industries [2003 (153) E.L.T. 114 (Tri. - Del.)
- Muzaffarnagar Pipe Industries (P) LTD. 2011 (265) E.L.T. 182 (All.)
- Vikram International 2012 (277) E.L.T. 425 (G.O.I.)
- Dy Beathel Enterprises [2021-TIOL-890-HC-MAD-GST]

Penalty not leviable

- M.K. Jain 2013 (291) E.L.T. 217 (Tri. - Del.)

Penalty confirmed – established fraud

- Arsh Castings Pvt. Ltd. 1996 (81) E.L.T. 276 (Tri.)
- Jai Mata Di Cargo Services P. Ltd. 2018 (15) G.S.T.L. 226 (All.)
- Vee Kay Enterprises 2011 (266) E.L.T. 436 (P & H)

Bail

- Entirely at the discretion of the Courts

FAILURE TO PAY WITHIN 180 DAYS

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

Rule 37

- (1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, but fails to pay to the supplier thereof, the amount towards the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16, shall pay an amount equal to the input tax credit availed in respect of such supply along with interest payable thereon under section 50, while furnishing the return in FORM GSTR-3B for the tax period immediately following the period of one hundred and eighty days from the date of the issue of the invoice:
- Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:
- Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.;
- (2) Where the said registered person subsequently makes the payment of the amount towards the value of such supply along with tax payable thereon to the supplier thereof, he shall be entitled to re-avail the input tax credit referred to in sub-rule (1).]
- (3) Omitted
- (4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier.

Rule 37

- Validity of the provisos
- Failure to pay
- Validity of the amended Rule 37
- Validity of Rule 37 prior to 01.10.2022
- Partial payment within 180 days
- Imposition of interest
- Period for reversal

Non-
payment
within 180
days

Performance guarantee

- Union Of India vs M/s Hindustan Zinc Ltd (Misc. Application No. 82/2019) (Raj.)
 - This Court is of the opinion that the argument of the Revenue that performance guarantee amounts withheld by the assessee are not per se covered by the circular, is incorrect. A clear reference to amounts withheld towards various counts including security, in the opinion of the court, comprehends the withholding of amounts towards performance guarantee.

ITC not reversed but interest paid

- Transpolar Logistics (India) Pvt. Ltd. (Appeal No. ST/88198/2018)(CESTAT)

ITC & depreciation

- Sec. 16(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

Limitation – Time limits

ITC – Time limits

- Sec. 16(4)
 - A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the thirtieth day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.
 - Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.

Press Release
dated 04th
Oct, 2022

- it is clarified that the extended timelines for compliances listed in para 2 are applicable to the compliances for FY 2021-22 onwards. It is further clarified that the said compliances in respect of a financial year can be carried out in the relevant return or the statement filed/ furnished upto 30 November of the next financial year, or the date of furnishing annual return for the said financial year, which ever is earlier. It is also clarified that no extension of due date of filing monthly return/ statement for the month of October (due in November) or the due date of filing quarterly return/ statement for the quarter ending September has been made vide the amendments in CGST Act, 2017 notified through Notification No. 18/2022-Central Tax dated 28.09.2022.

ENTITLEMENT - WHEN

- Will it apply to imports ?
- Sec. 16(2) vs. Sec. 16(4) ?
- Nexus with GSTR – 3 and not GSTR – 3B ?
- Retrospective amendment in Rule 61(5) w.e.f. 09.10.2019 ?
- The law does not compel the doing of impossibilities ?
- “Taking the ITC” vs. “Crediting the amount in the Ecr1” ?
- RCM – “invoice for supply” vs. “invoice for receipt” – proviso to Sec. 16(4) ?
- RCM – qua the date of self-invoice vs. date of receipt of underlying supplies ?

ENTITLEMENT - WHEN

- Sec. 16(4)
 - When is the credit “taken” ?
 - Scheme of the Act
 - Sec. 16(1) read with Rule 36(1)
 - Sec. 37, 38 & 39
 - Sec. 41, 42 & 43
 - Sec. 16(2)
 - “Entitlement” vs. “Taking”
 - Sec. 16(2) vs. Sec. 16(4)

Restrictions – Block credits

RESTRICTIONS UNDER SEC. 17

- Sec. 17(1) of the CGST Act, 2017
 - Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

ITC IMPLICATIONS

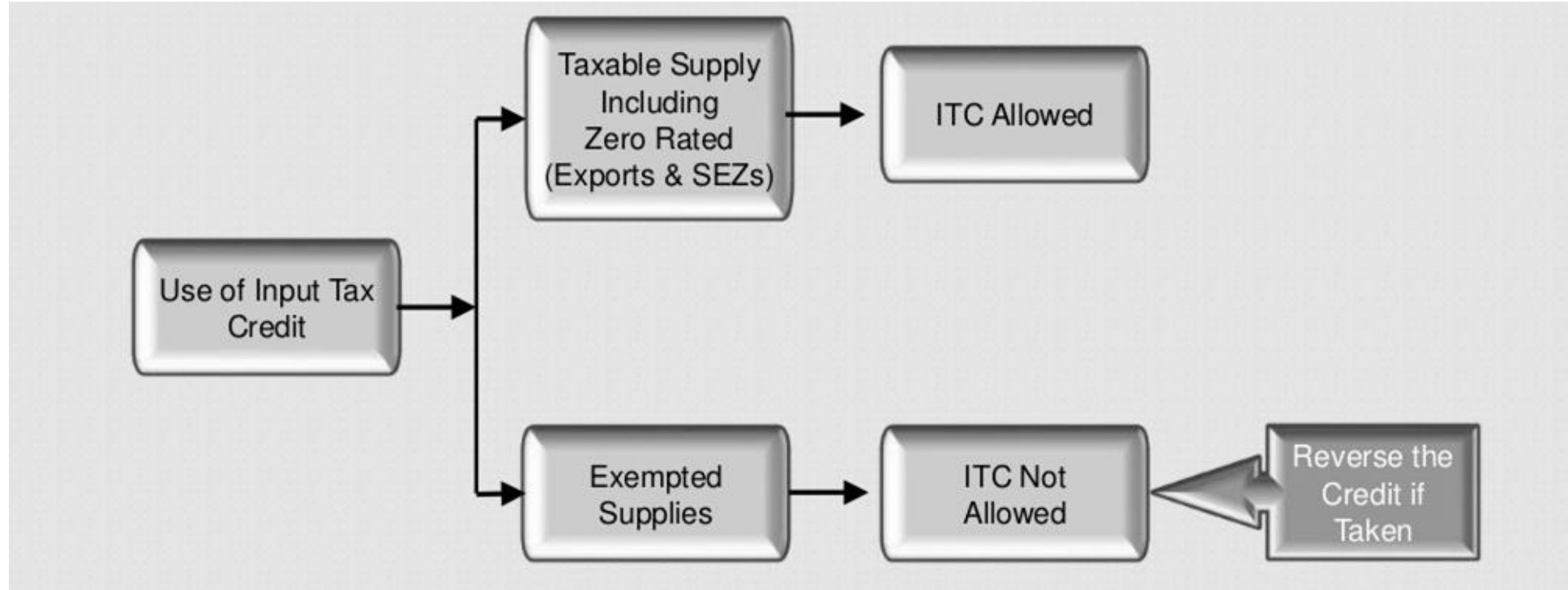
Sec. 17(2)

- 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.

Sec. 17(3)

- The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

ITC IMPLICATIONS



ISSUES

Sec. 17(3) inclusions in value over and above the definition of “exempt supplies”:

- 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.

Explanation added vide CGST (Amendment Act), 2018

- “value of exempt supply” shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.
 - Para 5 – sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building.

ISSUES

- Sec. 17(3) vis-à-vis Sec. 17(2)
 - “Value of exempt supplies vis-à-vis exempt supplies
 - Rule 42 & 43 requires “value of exempt supplies”
 - Erstwhile Rule 6 of CCR, 2004 had Explanation 3 & 4
 - 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.”
- Sales Tax Commissioner v. Modi Sugar Mills AIR 1961 SC 1047
 - In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions'. The court must look squarely at the words of the statute and interpret them.
- CIT v. Jalgaon Electric Supply Co. AIR 1960 SC 1182
 - if the legislature fails to express itself clearly and the tax-payer escapes by not being brought within the letter of the law, no question of unjustness as such arises.
- NMDC Ltd. v. State of M.P. (2004) 6 SCC 281
 - In case of conflict, the computation provision shall give way to the charging provision.
- Arun Kumar v. UOI (2006) TAXMAN 659 (SC)
 - It is only when there is a ‘concession’ in the matter of rent in respect of any accommodation provided by an employer to his employee, the question about that the mode, method or manner as to how such concession can be computed arises.
- Govind Saran Ganga Saran v. CST 1985 Supp SCC 205

ISSUES

- Whether Explanation added vide CGST (Amendment) Act, 2018 would be retrospective
 - Reasoning given while sharing the draft of the amendments:
 - It is proposed to allow availment of ITC on activities or transactions specified in Schedule III (other than sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building) by excluding it from the ambit of 'exempt supply' on which ITC is blocked. The proposed amendment is a taxpayer friendly measure.
 - Even without the said amendment the transactions contained in Schedule III are neither supply of goods nor supply of services
 - Hence it cannot be an exempt supply

ISSUES

Insertion of Sr. No. 7 & 8 in Schedule III w.e.f. 01.02.2019

- 7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into the taxable territory
- 8 (a) Supply of warehoused goods to any person before clearance for home consumption.
- (b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.

Will it be an exempt supply before such amendment ?

- Basf India Limited- 2018-TIOL-82-AAR-GST dated 21st May 2018 – ITC reversal required.
- Proviso to Sec. 5(1) of the IGST Act, 2017.
- Eventual importer pays the IGST.

ISSUES

- Sec. 17 of IGST Act, 2017
 - (2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.
- Therefore zero-rated exempt supplies would not lead to ITC restrictions u/s 17(2).

Exclusions

- Explanation 1 to Rule 43: For the purposes of [rule 42](#) and this rule, it is hereby clarified that the aggregate value of exempt supplies shall exclude:-
- (b) the value of services by way of accepting deposits, extending loans or advances in so far as the consideration is represented by way of interest or discount, except in case of a banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances; and
- (c) the value of supply of services by way of transportation of goods by a vessel from the customs station of clearance in India to a place outside India.]
- (d) the value of supply of Duty Credit Scrips specified in the notification of the Government of India, Ministry of Finance, Department of Revenue No. 35/2017-Central Tax (Rate), dated the 13th October, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number GSR 1284(E), dated the 13th October, 2017

ISSUES

- Are Rule 42 & 43 sacrosanct ? In other words can the attribution of ITC be on a base other than turnover ?
- Sec. 16
 - 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.
- What if ITC taken is only attributable to taxable supplies ?
 - Chandrapur Magnet Wires (P) Ltd. V. CCE 1996 (8) ELT (SC)
 - CCE VS. Bombay Dyeing & Mfg. Co. Ltd. 2007 (215) ELT 3 (SC)
 - CCE Vs. Ashima Dyecot Ltd. 2008 (232) ELT 580 (Guj)
- Foods, fats and fertilizers Ltd (2009) (244) E.L.T. (Tri-Bang)
 - When a scientific base is adopted to avail only proportionate credit instead of full credit involved in an invoice, the same amounts to maintaining separate accounts.

ISSUES

- Proviso to Rule 42(1)
 - Provided that where the amount of input tax relating to inputs or input services used partly for the purposes other than business and partly for effecting exempt supplies has been identified and segregated at the invoice level by the registered person, the same shall be included in 'T1' and 'T2' respectively, and the remaining amount of credit on such inputs or input services shall be included in 'T4'.

ISSUES

- Application of Rule 42 & 43.
 - Notification No. 16/2019 – CT dated 29.03.2019 in force w.e.f. 01.04.2019
 - “and at summary level in FORM GSTR-3B”
- What would be the position before 01.04.2019 ?
- Can it be said that in absence of a mechanism to carry out the reversal, the charge would fail ?

ISSUES

- Rule 42
 - Applies to cases covered u/s 17(1) as well as 17(2)
 - Is with respect to ITC availed on inputs and input services
 - First find C2 (common credit)
 - $C2 = C1$ (i.e. $T - (T1 + T2 + T3) - T4$)
 - T = Total ITC
 - T1 = Exclusively non-business
 - T2 = Exclusively exempted
 - T3 = Non eligible ITC
 - T4 = Exclusively taxable including zero-rated
 - $D1 = (E/F) * C2$
 - E = Exempted turnover
 - F = Total turnover in the State
 - $D2 = 5% * C2$
 - Eligible ITC = $C3 = C2 - (D1 + D2)$
 - Final working for FY to be done before the due date for Sept return for the next FY
 - Shortfall to be reversed with interest from April till date of pmt.
 - Excess to be availed before the said due date.

RESTRICTIONS UNDER SEC. 17

- Sec. 17(5)
 - Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely :—
 - (a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely :—
 - (A) further supply of such motor vehicles; or
 - (B) transportation of passengers; or
 - (C) imparting training on driving such motor vehicles;

RESTRICTIONS UNDER SEC. 17

- (aa) vessels and aircraft except when they are used —
 - (i) for making the following taxable supplies, namely :—
 - (A) further supply of such vessels or aircraft; or
 - (B) transportation of passengers; or
 - (C) imparting training on navigating such vessels; or
 - (D) imparting training on flying such aircraft;
 - (ii) for transportation of goods;
- (ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):
- Provided that the input tax credit in respect of such services shall be available —
 - (i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;
 - (ii) where received by a taxable person engaged —
 - (I) in the manufacture of such motor vehicles, vessels or aircraft; or
 - (II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

RESTRICTIONS UNDER SEC. 17

- (b) the following supply of goods or services or both —
 - (i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance :
 - Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;
 - (ii) membership of a club, health and fitness centre; and
 - (iii) travel benefits extended to employees on vacation such as leave or home travel concession :
 - Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

RESTRICTIONS UNDER SEC. 17

- (c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
- (d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.
 - Explanation. — For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;
 - 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.

RESTRICTIONS UNDER SEC. 17

- Safari Retreats Pvt. Ltd. Manu/OR/0322/2019 dated 17.04.2019
 - If the benefit of taking credit of input tax under Section 16 of the CGST Act and OGST Act is denied to the petitioner No. 1 by invoking Section 17(5)(d) of the CGST Act and OGST Act, in that event, the very object of enacting CGST Act and OGST Act for reducing the cascading effect of various indirect taxes and reduction of multiplicity of indirect taxes, will be frustrated even when the business of the petitioner No. 1 is a continuous one and there is no break at any point of time. It is a well settled law that the interpretation which defeat the very intention of the legislature should be avoided and that interpretation which advances the legislative intent will have to be accepted.

RESTRICTIONS UNDER SEC. 17

- (e) goods or services or both on which tax has been paid under section 10;
- (f) goods or services or both received by a non-resident taxable person except on goods imported by him;
- (g) goods or services or both used for personal consumption;
- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and *Noscitur a sociis*
 - Goods lost - ARS Steels & Alloy International Pvt. Ltd. 2021-VIL-484-MAD
- (i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

RESTRICTIONS UNDER SEC. 17

- UOI v. Indian Aluminium Co Ltd. (1995) 77 ELT 268 (SC)
 - Credit cannot be denied if inputs are lost during the production process.
- State of Madras vs M/s. Swastik Tobacco Factory [1966] AIR 1000 (SC)
 - In the taxation laws the phrase “in respect of” is synonymous with the expression “on”.
- Commissioner v. Tata Advanced Materials Ltd.
 - Merely because insurance company has paid excise duty would not render the availment of credit wrong or irregular unless the law provides for its reversal.
- Sonia Bhatia v. State of UP (1981) 2 SCC 585
 - A ‘gift’ is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. A ‘gift’ is a gratuity and an act of generosity and not only does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift.

Interest

- Sec. 50(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.]

Interest

- Rule 88B - Manner of calculating interest on delayed payment of tax (relevant extract)
- (3) In case, where interest is payable on the amount of input tax credit wrongly availed and utilised in accordance with sub-section (3) of section 50, the interest shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of section 50.
- *Explanation.* -For the purposes of this sub-rule, -
- (1) input tax credit wrongly availed shall be construed to have been utilised, when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, and the extent of such utilisation of input tax credit shall be the amount by which the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed.
- (2) the date of utilisation of such input tax credit shall be taken to be, -
- (a) the date, on which the return is due to be furnished under section 39 or the actual date of filing of the said return, whichever is earlier, if the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, on account of payment of tax through the said return; or
- (b) the date of debit in the electronic credit ledger when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, in all other cases.

CRITICAL CHECKPOINTS

- Critically understand the business
- Take an overview of record keeping
- Apply the rules
 - Entitlement
 - Eligibility
 - Limitation
 - Restrictions
- Identify the issues
 - Examine the facts (contract, documentation, etc.)
 - Apply the law
 - Gauge the risk
 - Take a position
 - Disclosure
 - Availment and reversal under protest seeking adjudication

THANKS !!

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