



The Institute of Chartered Accountants of India

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA GST & INDIRECT TAXES COMMITTEE

Webinar on Analysis of Critical Issues In Input Tax Credit under GST

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DEFINITIONS

- **Sec. 2(63) :- Input tax credit**
- **"Input tax credit" means the credit of input tax;**

- **Sec. 2(62) :- Input tax**

"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;**

INPUT TAX CREDIT PROVISIONS

ITC PROVISIONS

SECTION – 16 TO 21
RULES – 36 TO 45

SECTION - 16	SECTION - 17	SECTION - 18
ELIGIBILITY & CONDITIONS OF ITC	APPORTIONMENT OF CREDITS & INELIGIBLE CREDITS	ITC IN SPECIAL CIRCUMSTANCES

ELIGIBILITY FOR TAKING INPUT TAX CREDIT

SEC. 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*

SEC-16(2) CONDITIONS FOR AVAILING INPUT TAX CREDIT

**Possession of
Tax Invoice**

**Receipt of Goods
or Services**

**Tax charged has
been paid to
Government**

**Supplier has
furnished Return
u/s 37 i.e. Form
GSTR 1**

**ITC gets
reflected in
GSTR 2B & it is
not restricted
under section 38**

**Furnished
Return u/s 39**

CAPITAL GOODS ON WHICH DEPRECIATION IS CLAIMED – 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.

SECTION 16(4) – INPUT TAX CREDIT TIME LIMIT

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.

As per press release dated 4th October 2022 amendment of 30th November shall be applicable from FY 2021-22 onwards.

RULE 36(4) : RESTRICTION ON AVAILMENT OF ITC AS PER GSTR-2B

Before insertion of said Rule, taxpayer was claiming ITC on a self declaration basis in Form GSTR-3B. The amount of ITC which is not reflected in Form GSTR 2A/2B was treated as **Provisional credit**.

However, after insertion of Rule 36(4) of CGST Rules, 2017 the provisional ITC amount is restricted only to the extent of the total eligible ITC amount reflected in the Form GSTR-2B for such period.

RULE 37A : NON -PAYMENT OF TAX BY SUPPLIER

Rule 37A inserted in CGST Rules 2017 w.e.f 26.12.2022 requires reversal of input tax credit in the case of non payment of tax by the supplier and re availment thereof for compliance with clause (c) of Section 16(2) of the Act.

Where the supplier has declared an invoice in GSTR-1 but has not filed GSTR-3B for that period till 30th September of the following FY in which the recipient has availed the ITC, the recipient would be required to reverse the ITC availed in GSTR 3B, filed on or before 30th November of following the end of the year in which ITC is claimed.

Non-reversal of ITC by a recipient as above within stipulated time period would require the recipient to repay the ITC availed along with the interest payable under Section 50.

The recipient can re-avail the ITC in form GSTR 3B once the supplier has furnished the return in GSTR 3B for the said tax period.

**SOME CRITICAL ISSUES
IN
INPUT TAX CREDIT**

**INPUT TAX CREDIT
IN CASE
REGISTRATION OF DEALER IS
CANCELLED**

M/S LGW INDUSTRIES LIMITED & ORS. V. UNION OF INDIA & ORS. (2021-VIL-868-CAL)

- ITC cannot be denied on the ground of suo-moto cancellation of Registration Certificate.
- *Disallowance of input tax credit on the ground that the purchases made by petitioners are from **non-existing suppliers** and the bank accounts opened by those suppliers are on the basis of fake documents and that the petitioners have not verified the genuineness and identity of the suppliers before entering into transaction with those suppliers*

M/S LGW INDUSTRIES LIMITED & ORS. V. UNION OF INDIA & ORS. (2021-VIL-868-CAL)

*The respondents to consider afresh the cases of the petitioners on the issue of their entitlement of benefit of input tax credit by considering the documents the petitioners want to rely in support of **their claim of genuineness of the transactions and shall also consider as to whether payments on purchases in question along with GST were actually paid or not to the suppliers and also as to whether the transactions and purchases were made before or after the cancellation of registration of the suppliers and also consider as to compliance of statutory obligation by the petitioners in verification of identity of the suppliers** - If it is found that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers, the petitioners shall be given the benefit of input tax credit.*

**INPUT TAX CREDIT
IN CASE
OF NON-GENUINE DEALER**

M/S. D.Y. BEATHEL ENTERPRISES 2021(3)TMI 1020 – [MADRAS]

- 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 –
- 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.

M/S. D.Y. BEATHEL ENTERPRISES 2021(3)TMI 1020 – [MADRAS]

- That apart in the enquiry in question, the Person who supplied / sold the goods, ought to have been examined.
- 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.
- They should have been confronted. - This is all the more necessary, because the respondent has taken a stand that the petitioners have not even received the goods and had availed input tax credits on the strength of generated invoices.

**INPUT TAX CREDIT
MISMATCH
(GSTR-2A VS GSTR-3B)**

BHARAT ALUMINIUM COMPANY LTD. V. UOI & ORS

2021-TIOL-1414-HC-CHHATISGARH-GST

- The writ petition was filed by Bharat Aluminium Company against a Notice dated July 1, 2020 and Recovery Order dated January 22, 2021 passed by the Revenue denying ITC to the Petitioner, on the basis of mis-matching of ITC availed in Form GSTR-3B with the details furnished by suppliers in Form GSTR-2A for the period 2018-19.
- The Hon'ble Court observed that, a perusal of the notice and Recovery Order would show that the issue raised by the Petitioner needs consideration.
- An Interim relief was granted to the petitioner and the Hon'ble court directed the respondent not to take any coercive steps pursuant to the Recovery Order.

**BLOCKING OF
INPUT TAX CREDIT
(RULE – 86A)**

S. S. INDUSTRIES V/S. UNION OF INDIA

[2020] 122 TAXMANN.COM 296 (GUJ)

- 'Reason to believe' is necessary to be formed for blocking ITC. Existence of relevant material is a pre-condition to form opinion.
- Power under Rule 86A should neither be used a tool to harass the assessee nor in a manner which may have irreparable loss to the business of the assessee.
- Rule 86A casts an obligation upon the authority to form an opinion before blocking credit, but it is silent with regard to passing of any specific order assigning prima facie reasons for invoking Rule 86A.
- In absence of any cogent or credible material, action of blocking of ITC would be malice in law.
- Indefeasible right to avail ITC vis-à-vis Rule 86A: -
 - Utilization of accrued credit is vested right. No vested right accrues before taking credit.
 - Once the Credit is taken validity, the right is indefeasible.

**PAYMENT TO VENDOR WITHIN 180
DAYS
(RULE – 37)**

PAYMENT TO VENDOR WITHIN 180 DAYS (RULE – 37)

- Interpretation of 'fails to pay'
- As per Black's Law Dictionary: - DEFAULT. By its derivation, a failure;
- Not required for branch transfers / Supplies under Schedule - I
- Reversal along with interest ???
- Reclaim of reversed credit on actual payment

**SUGGESTED GROUNDS
FOR REPLY TO NOTICES
OF
MISMATCH OF
INPUT TAX CREDIT**

SUGGESTED GROUNDS FOR REPLY TO NOTICES OF MISMATCH OF INPUT TAX CREDIT

- Check under which section, the notice has been issued. Notice for mismatch in case of genuine purchases can not be issued u/s. 74.
- The SCN must mention the reasons for proposed demand except the mismatch of ITC. It is settled legal principle that SCN should state specific reasons.
- The SCN must provide ITC pertains to which supplier. How conditions of section 16 are not fulfilled etc.
- The supplier was holding valid registration at the time of supply. The said registration has been granted by government and buyer has no role in it.

SUGGESTED GROUNDS FOR REPLY TO NOTICES OF MISMATCH OF INPUT TAX CREDIT

- Reasonable verification of KYC of Supplier's profile has been done.
- Goods or Services received are actually used in the course or furtherance of business.
- Payments have been made and the same is through proper banking channels.
- All purchases are duly accounted for in books of accounts.
- After payment to supplier, the assessee does not have any means to check the payment of taxes by the supplier.

SUGGESTED GROUNDS FOR REPLY TO NOTICES OF MISMATCH OF INPUT TAX CREDIT

- Assessee has been regular in filing of GST returns and payment of taxes.
- The supplier acts as agent of government in collecting tax and the buyer has duly paid tax to the agent of the government.
- Disallowance of ITC would result in shifting of tax liability from supplier to buyer.
- Disallowance of ITC would result in double taxation on buyer, at the time of purchase and at the time of disallowance of ITC.
- If the department recovers the tax from supplier as well as the buyer, it would result in unjust enrichment to the government.

SUGGESTED GROUNDS FOR REPLY TO NOTICES OF MISMATCH OF INPUT TAX CREDIT

- Unless and until the malafide association of buyer with supplier is proved, no demand can be raised from the buyer.
- Disallowance of ITC in each and every case would result in treating the genuine purchaser and fraudulent purchaser at the par.
- It is also submitted that ITC is substantive right granted to the taxpayer under the provisions of the GST Act as well as Constitution of India. It is well established legal principle that such substantive right can not be denied on basis of procedural lapses.

SUGGESTED GROUNDS FOR REPLY TO NOTICES OF MISMATCH OF INPUT TAX CREDIT

- Whether any action taken against such supplier or not?
- If SCN has been issued on account of ab-initio cancellation of registration. – The registration was valid and active at the time of transactions need to be established. The reasonable care has been taken.

CIRCULAR 183/15/2022 –27.12.22

(APPLICABLE FROM 01.07.17 TO 08.10.19)

- ❖ Clarification for reconciling the mismatch in ITC for FY 2017-18 and 2018-19.
- ❖ The difference may be due to various reasons like Reporting as B2C in GSTR 1, Reporting on wrong GSTIN in GSTR-1 etc.
- ❖ Conditions of possession of invoice, receipt of goods / services and payment to supplier to be fulfilled.

CIRCULAR 183/15/2022 –27.12.22

(APPLICABLE FROM 01.07.17 TO 08.10.19)

- ❖ If difference with respect to single supplier is more than Rs. 5 Lacs then certificate from CA / CMA about discharging liability by supplier need to be obtained.
- ❖ If difference with respect to single supplier is less than Rs. 5 Lacs then certificate from supplier about discharging liability by supplier need to be obtained.

CIRCULAR 193/05/2023 –17.07.23

(APPLICABLE FROM 09.10.19 TO 31.12.21)

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

BLOCKED CREDIT [SECTION 17(5)(C) & 17(5)(D)]

- Section 17 (5) (c) & section 17 (5) (d) • Safari Retreats Pvt. Ltd. -2019-TIOL-149-SC-CX-LB.
- The expression 'plant or machinery' used in Section 17(5)(d) cannot be given same meaning as the expression 'plant and machinery' defined by the explanation to Section 17 – Chief commissioner of CGST & Ors. v. Safari Retreat Private Limited and Ors - CA No. 2948 of 2023 (SC).

BLOCKED CREDIT [SECTION 17(5)(C) & 17(5)(D)]

- The 55th GST Council meeting recommended amending section 17(5) of the GST Act related to blocked Input Tax Credit (ITC).
- Section 17(5)(d) to replace the wording “plant or machinery” with “plant and Machinery” retrospectively. This amendment will come to effect from 01.07.2017, and now the wording under the Section 17(5)(d) aligns with the explanation mentioned in Sec-17.
- Issues:
 - A) Whether ITC pertaining to construction of Mall is eligible?
 - B) What if there is separate contract of goods and service instead of work contract?

INTERPRETATION BY RESPONDENTS OF "PLANT AND MACHINERY" AND "PLANT OR MACHINERY"

- **Distinction Between “Plant and Machinery” vs. “Plant or Machinery”**
- **Definition of Plant**
- **Application of Functionality Test**
- **Legislative Intent and Consistency**
- **Exemption for Malls, Hotels, Warehouses as Plants**

ARGUMENTS BY REVENUE BEFORE HON'BLE SUPREME COURT

- **Justification for Classification:** The Revenue argued that the classification in Section 17(5)(d) was based on Intelligible differentia.
- **ITC as a Statutory Right:** The Revenue emphasized that ITC is a statutory right rather than a fundamental or constitutional right.
- **Interpretation of "Plant or Machinery":** The Revenue contended that the term "Plant or Machinery" should be interpreted as "Plant and Machinery" to reflect the legislative intent.
- **Challenge to Constitutional Validity:** The Revenue submitted that the Parliament is entitled to make policy choices and adopt appropriate classifications, especially given the latitude that the Constitutional jurisprudence allows in matters involving tax legislation. They asserted that the principle of equality under Article 14 of the Constitution does not preclude the classification of property, credit, profession, or events for taxation purposes.

ANALYSIS OF HON'BLE SUPREME COURT

➤ Exceptions to clause (d) of section 17(5):

- ❑ The Hon'ble Supreme Court observed that there are two exceptions in clause (d) to the exclusion from ITC.
- ❑ The first exception is where goods or services or both are received by a taxable person to construct an immovable property consisting of a "Plant or Machinery".
- ❑ The second exception is where goods and services or both are received by a taxable person for the construction of an immovable property made **not on his own account**. Construction is said to be on a taxable person's "own account" when -
 - (i) it is made for his personal use and not for service; or
 - (ii) it is to be used by the person constructing as a setting in which business is carried out.
- ❑ **However, construction cannot be said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.**

ANALYSIS OF HON'BLE SUPREME COURT

➤ Interpretation of "Plant or Machinery":

- ❑ The Supreme Court made an in-depth analysis to determine whether the explanation under Section 17(5)(d) encompassed the term "Plant or Machinery". The Court noted that the CGST Act 2017 distinguishes between "Plant and Machinery" and "Plant or Machinery", and that the latter terminology was used only in Section 17(5)(d).
- ❑ The Court concluded that the distinction was intentional and that the provision should not be interpreted to deny ITC where immovable property constitutes a 'Plant' for the purpose of section 17(5)(d) of the Act.
- ❑ The court further held that if the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant.

ANALYSIS OF HON'BLE SUPREME COURT

➤ Constitutional Challenge:

- ❑ The Supreme Court assessed whether the classification made under Section 17(5)(d) was arbitrary or discriminatory.
- ❑ The Court recognized that **immovable property and immovable goods form a distinct class within the GST framework**, and clauses (c) and (d) of Section 17(5) are intended to apply specifically to this category.
- ❑ The Court reasoned that the differentiation established by clauses (c) and (d) has a rational basis, and they meet the constitutional test for reasonable classification.
- ❑ The right to claim ITC is statutory rather than inherent, subject to the terms explicitly prescribed in the legislation.
- ❑ Consequently, clauses (c) and (d) of Section 17(5) were determined to be neither discriminatory nor unconstitutional.

ANALYSIS OF HON'BLE SUPREME COURT

➤ Meaning of the term 'Plant':

❑ The Supreme Court also delved into its various decisions in the context of Income Tax law to discuss the term 'Plant'. Relying on these decisions, the Supreme Court held as under: -

➤ In case of Hotels and Cinema Theatres:

❑ On the basis of its decision in the case of Anand Theatres and Taj Mahal Hotel, it was held that hotels and cinema theatres cannot be said to fall under the purview of the term "Plant".

❑ On the basis of its decision in the case of Karnataka Power Corporation, it was held that the applicability of the decision of Anand Theatres and Taj Mahal Hotel is limited to hotel or cinema theatre. As such, said decisions cannot be applied to other cases involving immovable property such as malls, warehouses, etc.

➤ In Other Cases:

❑ For cases involving building other than a hotel or a cinema theatre, the Supreme Court highlighted that the same is a question of fact and would depend on the following conditions – (a) the same is constructed to suit the assessee's special technical requirements; and (b) the same should be essential in carrying out the activity of supplying services.

WHAT IS FUNCTIONALITY TEST ?

- **Movability with Preservation of Operational & Functional Utility;**
- **Extent of Integration with Immovable Property;**
- **Physical and Operational interdependence of the goods with the Immovable Property;**
- **Indispensable for Business Operations;**
- **Specialized Design & Engineering;**
- **More than a mere safeguard for assets;**

WAY FORWARD

- **Fact based determination is required to ascertain whether the constructed property qualifies as 'Plant'.**
- **Contemplate the requirement of making additional submissions in case of ongoing litigation.**
- **Explore the options for availing ITC already reversed / not claimed.**
- **Whether any clarifications / circulars will be issued by Department to clarify what will qualify as 'Plant'.**
- **Retrospective change in law.**

**APPLICABILITY OF DEMAND AND PENALTY
PROVISIONS IN RESPECT OF TRANSACTIONS
INVOLVING FAKE INVOICES**

**CIRCULAR NO. 171/03/2022-GST DTD
06.07.2022**

DEMAND AND PENAL PROVISIONS IN RESPECT OF TRANSACTIONS INVOLVING FAKE INVOICING

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 122(1)(ii) of the CGST Act, 2017 for committing an offence of issuing the invoice without actual supply.

DEMAND AND PENAL PROVISIONS IN RESPECT OF TRANSACTIONS INVOLVING FAKE INVOICING

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.

DEMAND AND PENAL PROVISIONS IN RESPECT OF TRANSACTIONS INVOLVING FAKE INVOICING

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.

DEMAND AND PENAL PROVISIONS IN RESPECT OF TRANSACTIONS INVOLVING FAKE INVOICING

Other Important Aspects: -

- 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.



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