

# INPUT TAX CREDIT

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# INPUT

- **Input** means **any goods other than capital goods** *used or intended to be used by a supplier in the course or furtherance of business.*
- Used or intended to be used
- *In the course or furtherance of*
- Section 2(17) of the CGST Act, 2017 defines 'Business' and includes
  - Any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity whether or not it is for pecuniary benefit
  - Any activity or transaction in connection with or incidental or ancillary to sub clause (a)
  - Any activity or transaction in the nature of sub clause (a) whether or not there is volume, frequency, continuity or regularity of such transaction.

# CAPITAL GOODS

- Capital Goods means goods the value of which is capitalized in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business.
- If depreciation is claimed on the tax component of the cost of capital goods and the plant and machinery under the provisions of the IT Act, 1961 by the registered person, ITC on the said tax component shall not be allowed.
- *If GST credit is sought to be claimed then depreciation cannot be claimed on the tax portion.*
- *Capital Expenditure Vs. Revenue Expenditure?*
- *Replacement of parts of machinery – repairs?*
- *Cost benefit exercise.*

# INPUT SERVICE

- **Input service** means **any service** used or intended to be used by a supplier in the course or furtherance of business.

# ITC

- Nexus to business
- Scope much wider than cenvat credit and VAT credit
- What is 'furtherance of business'?
- The Supreme Court in ***CIT Vs. Walchand 65 ITR 381***, observed that it is not open to the Department to adopt a subjective standard of reasonableness and disallow part of business expenditure as being unreasonably large
- The Supreme Court in the case of ***CIT Vs. Dhanraj Giri 91 ITR 544***, observed that it is not open to the Department to decide what type of expenditure the assessee should incur and in what circumstances

- The Supreme Court in the case of ***Shiv Raj Gupta Vs. CIT TS-353-SC-2020*** has set aside the order passed by the Delhi High Court and held that commercial expediency has to be adjudged from the point of view of the assessee and that the Income Tax Department cannot enter into the thicket of reasonableness of amounts paid of the assessee. The revenue has no business to second guess commercial or business expediency of what parties at arms-length decide for each other.

# ITC – PAST Vs. PRESENT

- Manufacturers
- Traders
- Service Providers
- Interesting decisions in the past
  - Balarpur Industries – Chemicals
  - HMM Industries – Horlicks Bottle Cap
  - Ponds India – Plastic Granules
  - Indirect inputs
  - Inputs lost during manufacture
  - Inputs used as fuel and sale of electricity
  - Usage outside the factory

# ITC and COVID 19

- Sanitation, Thermometers , Safety
- Group Medical Insurance
- Work form Home
- Gadgets , Equipment's , Installation services at employee residences
- Reimbursement of incremental cost
- Corporate Social Responsibility
- Special Insurance schemes
- Lock down and stoppage of production
- Delay in payments to vendors



# INPUT TAX CREDIT- SECTION 16(2)

- Input Tax Credit contingent upon
  - Possession of tax invoice / debit note or such other prescribed document
  - **Receipt of goods or services or both.**
  - **Tax charged in respect of supply and has been actually paid to the credit of the Government either in cash or through utilization of admissible input tax credit**
  - Furnishing of return
  - Amendment by FA 2021 to Section 16 of CGST Act inserting clause (aa)
    - Yet to be notified
    - New Condition

# POSSESSION OF TAX INVOICE

- What is possession?
- Is it mandatory for the unit claiming credit to maintain physical copies?
- Section 4 of the IT Act provides that where any law provides that information or any other matter shall be in writing or in the type-written or printed form then **notwithstanding** anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is –
  - rendered or made available in an electronic form; and
  - accessible so as to be usable for a subsequent reference
- E-Invoice regime

# “HE HAS RECEIVED THE GOODS OR SERVICES OR BOTH”

- Receipt of goods is mandatory
- E-way bill
- Concept of Goods Received Note (GRN)
- When everything is digital and e-driven, conditions create physical documents.
- Most of the fake invoice issues revolve around non-receipt of goods and mere issue of invoices.
- Receipt of services

# “HE HAS FURNISHED THE RETURN UNDER SECTION 39”

- Section 16(2)(a) provides that *he is in possession of tax invoice.*
- Section 16(2)(b) provides that *he has received the goods or service or both.*
- Section 16(2)(d) provides that *he has furnished the return under Section 39.*
- “He” in this context can mean only the recipient who is availing credit and not the supplier.
- **Supplier filing a return for ITC entitlement of the recipient is not the correct interpretation of Section 16.**

# **“SUBJECT TO SECTION 41 AND 43(A), THE TAX HAS BEEN ACTUALLY PAID TO THE GOVERNMENT EITHER IN CASH OR THROUGH UTILIZATION OF ITC”**

- Payment of tax by supplier
- Originally 16(2)(c) referred only to Section 41 and Section 43(a) has been added by 2018 Amendment Act *and yet to be notified*.
- Section 41 provides that the registered person shall be entitled to take credit of eligible ITC as self-assessed in his return.
- *Possession of invoice; receipt of goods are current events whereas payment of tax by the supplier is not simultaneous with the issue of invoice or movement of goods.*
- **If ITC can be claimed through self-assessment, Section 16(2)(c) should be seen as a post claim condition and not as an eligibility condition.**
  - *Waiting for payment of tax by supplier to claim credit may be unwarranted.*
  - *At best this condition can be checked only during Audit.*

# PAYMENT OF TAX BY SUPPLIER

- Conditions in Section 16(2) requiring the buyer to verify whether the supplier has paid the tax to the Government account has been challenged before the Delhi High Court in the case of ***Bharti Telemedia Ltd. Vs. Union of India***.
- The Madras High court in the case of ***Sri Vinayaga Agencies Vs. The Assistant Commissioner (CT), Chennai and another (2013) 60 VST 283*** held that the department is not empowered under Section 19(16) of the TNVAT act, to revoke the input tax credit availed on the plea that the selling dealer has not paid the tax when the petitioner-dealer has paid tax to the selling dealer and claimed Input tax credit by way of self-assessment.

# PAYMENT OF TAX BY SUPPLIER

- ***Arise India Ltd. Vs. Commissioner of Trade Taxes [TS-314-HC-2017(Del)-VAT]***
  - Section 9(2)(g) of the DVAT Act does not make any distinction between bonafide purchasing dealer and others.
  - The provisions should be read down whereby dealer or class of dealer shall not include a purchasing dealer who has bonafide entered into purchase transaction with validly registered selling dealer who had issued tax invoices .

# PAYMENT OF TAX BY SUPPLIER

- The Bombay High Court on the other hand in the case of ***Mahalaxmi Cotton Ginning Pressing and Oil Industries Vs. State of Maharashtra (2012) 51 VST 1*** had upheld similar provisions of the MVAT Act.
- *lex non cogit ad impossibilia*



# DOCTRINE OF IMPOSSIBILITY

- In the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal (2020) 7 SCC 1***, the Supreme Court referred to the legal maxim *lex non cogit ad impossibilia* that is the law does not demand the impossible and *impotentia excusat legem* i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.
- The maxim was applied in the context of requirement of a certificate to produce evidence by way of electronic record under Section 65B of the Evidence Act and held that having taken all possible steps to obtain the certificate and yet being unable to obtain it for reasons beyond his control, the respondent was relieved of the mandatory obligation to furnish a certificate.

# D.Y. BEATHEL ENTERPRISES

- A single Judge of the Madurai Bench of the Madras High Court quashed the assessment order on the following grounds:
  - If 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 buyer.
  - Respondent had not taken any recovery action against the seller.
  - Sellers have not been examined
  - Non-examination of the seller and non-initiation of recovery action against the seller is bad in law.

# D.Y. BEATHEL ENTERPRISES

- It is respectfully submitted that
  - Law does not shift liability to the recipient where there is a default of the supplier
  - GST is either on forward charge or reverse charge.
  - The charge remains as such and does not shift
  - If supplier has not paid the tax then the Government can only take action against the supplier.
  - The tax cannot be recovered from the recipient.
  - The ITC availed by the recipient can however be questioned based on Section 16(2)(c).

# COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Number of Companies have received notices comparing 3B and 2A
- Notices call for reversal with interest and in some case even penalty
- Mere letters without a section 73 Show Cause Notice
- Summons from DGGSTI on these aspects
- ***Can filing of GSTR 1 be a condition for availment of ITC by the recipient?***
  - *Before the amendment is notified*
  - *After the amendment is notified*

# COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Except for GSTR-1 and GSTR-3B, the filing of GSTR-1A, GSTR-2, GSTR-2A and GSTR-3 were all kept in abeyance;
- Matching mechanism as contemplated in GST did not take off
- Payment of GST by the taxpayers is by way of GSTR-3B and not by way of GSTR -1.
- GSTR -2A is an auto-populated form and at present, it is only a facilitation measure given to recipient of supply to check whether the corresponding supplier is depositing the taxes collected from him with Government.

# COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Non-reflection of invoices in GSTR-2A does not impact the ability of recipient tax payer to avail ITC on self-assessment basis, as the taxpayer has adhered to all the conditions listed down in Section 16 of the CGST Act, 2017.
- Section 42 deals with 'Matching, Reversal and Reclaim of Input Tax Credit' and Section 43 deals with 'Matching, Reversal and Reclaim of Reduction in Output Tax Liability' and both these provisions have not been operationalized.
- Filing of Form GSTR-2 and Form GSTR-3 remain suspended and therefore, neither Section 42(10) nor Section 43(10) would be applicable.
- No liability to pay interest under Section 50(3) CGST Act, 2017.

# COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- The Gujarat High Court in the case of ***AAP and Co., Chartered Accounts Vs. Union Of India***, held that the part of press release dated 18<sup>th</sup> October 2018 which clarified the due date for availing ITC for Financial year 2017-18 is the last date for filing return for March 2019 is illegal and contrary to Section 16(4) of the CGST Act/GGST Act read with Section 39(1) of the CGST Act/GGST Act read with Rule 61 of the CGST Rules/GGST Rules.
- The Court in this case had observed that a “*bare perusal of Rule 61 of the CGST/GGST Rules would indicate that the return prescribed in terms of Section 39 is a return required to be furnished in Form GSTR-3 and not GSTR-3; return in form GSTR-3B is only a temporary stop gap arrangement till due date of filing return in form GSTR-3 is notified in the GSTN portal*”.

# COMPARING GSTR 3B AND GSTR 2A - LEGALITY

- Rule 60(1) was substituted w.e.f. 01.01.2021.
- Rule 60(1) provides that details of outward supply furnished by supplier in GSTR -1 *shall be made available electronically to the recipients in Part A of Form GSTR -2A; GSTR – 4A; and GSTR – 6A, through the common portal.*
- **Even if one were to assume that GSTR – 2A had attained legitimacy on account of Rule 60(1) of the CGST Rules, 2017, it has no relevance for the period prior to 01.01.2021.**
- It is quite strange that Rule 60 was first substituted from 01.01.2021 and then to give it legitimacy Section 16(2)(aa) is being inserted from a date to be notified
  - Act amended to match rules???
- **Effect is that till 16(2)(aa) gets notified supplier filing GSTR 1 cannot be insisted as a condition for availment of ITC**



# RULE 36(4)

- Input tax credit to be availed by the 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 20 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.*"
- Subsequently reduced .
- Cumulative application for Feb to Aug 2020 and now April and May 21 - COVID related amendments.

# RULE 36(4)

- *The Board vide Circular No.123/42/2019 dated 11.11.2019 has clarified that this being a new provision, the restriction is not imposed through the common portal and it is the responsibility of the taxpayer that credit is availed in terms of the said rule and therefore, the availment of restricted credit in terms of sub-rule (4) of rule 36 of CGST Rules shall be done on self-assessment basis by the tax payers.*

# IS RULE 36(4) VALID?

- Source of power for a rule which refers to a ceiling limit of 20% in the context of suppliers who have not uploaded invoice data?
- The ostensible reference to 20% in the context of ITC restriction is only Section 43A which is yet to come into force.
- Possible to interpret that Rules would be effective only from the date Section 43A is brought into force
- Alternatively, in the absence of a source of power, the Rule which provides for restriction is cannot be considered as valid.
- No power to restrict a credit which is validly available under Section 16(2) of the CGST Act, 2017 and all restrictions with reference to credit are set out only in Section 17 of the CGST Act, 2017.
- Writs in Karnataka HC

# ITC – SUMMONS, NOTICES, etc.

- Fake Invoice Racket
- Statements given by some Supplier
  - Summons to recipient
  - Pressure to reverse ITC without SCN
  - Arrest Provisions
  - Right of cross examination
- Third Party records alone cannot be relied upon as admissible piece of evidence- ***V.C Shukla – SC***
- Rule 86A which deals with blocking of credit challenged before Guj. HC

# ITC – OTHER ISSUES

- Cancellation of supplier registration
- Cancellation with retrospective effect
- Goods supplied and received
- In the context of VAT the Madras High Court in the case of ***Infinity Wholesale Ltd. Vs. ACCT (2015) 82 VST 457*** has held that retrospective cancellation of suppliers registration cannot affect buyers credit
- ***In M/s. JKM Graphics Solutions Private Limited & Others Vs. Commercial Tax Officer (2017) 99 VST 343*** it has been held that ITC availed by the Petitioner could not have been proposed to be reversed or reversed on the ground that the selling dealer has not filed returns or paid taxes.

# PROVISIONAL ATTACHMENT

- **Section 83**
- Where during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, *he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.*
- Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1)

# ***RADHA KRISHAN INDUSTRIES VS. STATE OF HP (TS 168 – SC – 2021 – GST)***

- Art.226 can be exercised not only for enforcement of fundamental rights but for other purposes as well.
- Provisional attachment order cannot be passed before initiation of proceedings against the tax payer
- Restrictive power of Section 83 must be used sparingly
- Power of Commissioner is draconian. It will lead citizens and their legitimate business activities to their peril of arbitrary power.
- **Commissioner cannot make pre-emptive strikes on tax payers properties, merely because it is available for being attached. Opinion should be based on tangible material such as reliable information, tax payer past conduct etc.**
- circumstances must be such that without provisional attachment the interest of revenue would stand defeated.

# ***RADHA KRISHAN INDUSTRIES VS. STATE OF HP (TS 168 – SC – 2021 – GST)***

- Rule 159 lays down the modalities of provisional attachment. It is mandatory to furnish an opportunity of being heard to the person whose property is attached further, the said person is also entitled to submit objections on the ground that attachment cannot be done.
- consequences of provisional attachment are serious. It displaces the person whose property is attached from dealing with the property. When a taxpayer appeals against an order of provisional attachment there is a requirement to pay such amount of tax, interest, fine fees, fees and penalty. The payment of such amount would imply that the recovery proceedings are deemed to be stayed. In such event, the order of provisional attachment must cease to subsist.
- Once final assessment order under 74 is passed, provisional attachment must cease



# BLOCKED CREDITS

- Can a Developer avail credit of GST charged by contractors?
- Can a Developer avail credit in respect of GST charged by suppliers of services?
- Can a contractor avail credit of GST charged by sub-contractors?
- Can a Mall avail credit of the GST charged by contractors for building its mall ?

# BLOCKED CREDITS

- Section 17(5) ( c ) and Section 17 (5) (d)
- WCT 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 WCT service*.
- Goods or services or both received by a taxable person for construction of an immovable property (other than plant and machinery) on his own account including when such goods or services or both are used in the course of furtherance of business
- Impact on factories, warehouses, godowns, theatres, malls, commercial buildings.

# BLOCKED CREDITS

- *What is immovable property?*
- WCT vs. Composite Supply
- **Goods or services or both *received* by a taxable person for *construction* of an immovable property (other than plant and machinery) on his *own account* including when such goods or services or both *are used in the course or furtherance of business*.**
- Construction includes reconstruction, renovation, additions, alterations or repair to the extent of *capitalization to the said immovable property*.
  - *Capital expenditure vs. Revenue expenditure*
  - *Repair being revenue expenditure*
- AC plants, power plants, cement plants, ropeways, escalators, lifts – WCT or composite supply?
- Object of Annexation
- Degree of Annexation

# BLOCKED CREDITS

- ***Safari Retreats Pvt ltd & another Vs. Chief commissioner of CGST & others (2019) 25 GSTL 351,***
  - Narrow construction of interpretation of Section 17(5)(d) is frustrating the very objective of the GST Act .
  - Section 17(5)(d) has to be read down and the narrow restriction as imposed in reading of the provision by the Department is not required to be accepted, keeping in mind the language used in ***Eicher Motors Ltd. – (1999) 2 SCC 361*** the very purpose of the credit is to give benefit to the assessee.

# GOODS

## LOST, STOLEN, DESTROYED, WRITTEN OFF

- What is 'goods' in the context of Section 17(5)(h)
- Can it cover Final Products?
- What are inputs?
- What is the meaning of lost?
- What is the meaning of destroyed?
- What is written off?

# ARS STEELS & ALLOY INTERNATIONAL PVT. LTD.

- A Single Judge of the Madras High Court has held that
  - Situations set out in Section 17(5)(h) indicate loss of inputs that are quantifiable and involve external factors or compulsions. A loss that is occasioned by consumption in the process of manufacture is one which is inherent to the process of manufacture itself.
  - Reversal in case of loss of consumption of input which is inherent to manufacturing loss is misconceived as such loss is not contemplated or covered by the situations adumbrated under Section 17(5)(h).

# MAANSAROVAR (2021) 44 GSTL 126 (Mad.)

- Interest being intended to compensate the revenue for loss of capital, there is no loss insofar when revenue is in possession of the credit which is good as cash.
- Nature and object of a proviso should be taken into account while deciding the question of whether the proviso was prospective or retrospective
- Where a proviso was designed to eliminate unintended and prejudicial consequences which would cause hardship to a party, such a proviso should be seen to be remedial and one that mitigated the prejudice caused from inception

# OPEN ISSUES

- Is invoice matching the best solution?
- Refund of ITC on exports
- Non-availability of ITC on some items
- Time limit for availment of ITC
- Complex Rule 42 & 43



# THANK YOU



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