

INPUT TAX CREDIT UNDER GST

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ELIGIBILITY FOR TAKING ITC

- 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;

ISSUES

- Registered person ?
- Conditions and restrictions ?
- Prescribed ? Sec. 2(87) by way of rules
- Absolute Denial of Credit - Restaurants and Builders
 - Whether it is a condition or a restriction?
 - Whether the condition or restriction is prescribed?
 - Scope of rate notification?
 - What is the impact of non-fulfilment of condition?
 - Assessee can opt for more beneficial entry
 - H.C.L Limited v/s Collector of Customs, New Delhi (2001)130 E.L.T. 405 (S.C.).
 - Collector Of Central Excise, Baroda v/s Indian Petro Chemicals [1997 (92) E.L.T. 13 (S.C.)]

INPUT TAX

- 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;

ISSUES

- Supplied to him ?
- Charged vs. payable ?
- Wrong head ?
- Transitional credits ?

CAN ITC OF OTHER STATE'S BE CLAIMED ?

- Under which Act does a registered supplier avail ITC ?
- 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(62) of the CGST Act, 2017
 - “(62) “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 —“

CAN ITC OF OTHER STATE'S BE CLAIMED ?

- Sec. 2(104) of the CGST Act, 2017
 - “State tax” means the tax levied under **any** State Goods and Services Tax Act;”
- Sec. 16(2)
 - Possession of a tax invoice (Sec. 31 read along with Rule 36 as well as Rule 46)
 - Receipt of goods or services
 - Actual payment of tax
 - Filing of return u/s 39 (will have to be read down)
- What would happen if matching is made operational ? (Sec. 42 or now Sec. 43A)

CONSEQUENCES ON RECIPIENT ?

- Whether ITC reversal is required ?
- No legal provision made for ITC reversal.
- Sec. 54(8) of the CGST Act, 2017
 - Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to —
 - (d) **refund of tax in pursuance of section 77**

USED OR INTENDED TO BE USED IN THE COURSE OR FURTHERANCE OF BUSINESS

- 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;

USED OR INTENDED TO BE USED IN THE COURSE OR FURTHERANCE OF BUSINESS

- State of Travancore Cochin v. Shanmugha Vilas Casheunut 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.

USED OR INTENDED TO BE USED

- Intend 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.

CLAIMING ITC IS AN OPTION

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

CONDITIONS FOR CLAIMING ITC

- Sec. 16(2) of the CGST Act, 2017
- (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; - **RCM cases ?**
- (b) he has received the goods or services or both. – **Received where ?**
- (c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and
- (d) he has furnished the return under section 39 – **GSTR-3B ?**

ISSUES

- Precedent/subsequent ?
 - C-form analogy
 - Intent
 - “Subject to” – “conditional upon” K. R. C. S. Balakrishna Chetty & Sons v. State of Madras (1961 AIR 1152)

DOCUMENTATION

- Rule 36
 - Forward Charge – Tax Invoice
 - Forward Charge – Debit Note
 - Reverse Charge – Registered supplier – Tax Invoice
 - Reverse Charge – Unregistered supplier - Self Generated Invoice u/s 31(3)(f)
 - Bill of Entry
 - ISD Invoice

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

ACTUAL TAX PAYMENT CONDITION

- Arise India Limited vs Commissioner Of Trade & Taxes (Delhi High Court) (W.P.(C) 2106/2015)
 - Purchasing dealer cannot be asked to do the impossible
 - Recovery from seller
 - Failure to make reasonable classification violates Article 14
 - SLP of the department dismissed by SC in case of Arise India where the transactions were bonafide unlike other petitioners before the Del HC.
- Bharti Telemedia Ltd. Vs. Union Of India & Ors. (Delhi High Court) (W.P.(C) 6293/2019)
- Way forward ?

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 –
 - Furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in **FORM GSTR-2** for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice

ISSUES

- Will it apply to RCM ?
- Will it apply to imports ?
- “Fails to pay” ?
- Retention money ?
- Book adjustments ?
- Schedule I transactions ?
- Added to output tax liability with interest via GSTR – 2 – Rule 37 ?
- Interest liability ?

TIME LIMIT FOR TAKING THE CREDIT

- 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 due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.
 - 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.”

ISSUES

- 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 Ecrl” ?
- 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 ?

RULE 36(4)

- Notification No. 49/2019 – Central Tax
- **Rule 36(4) – inserted with effect from 09.10.2019**
 - Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed [10 per cent w.e.f. 01.01.2020] 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.
- Circular No. 123/42/2019 – GST dt. 11.11.2019

RULE 36(4)

Case	Eligible ITC as per books	Eligible ITC reflected in 2A	Permissible ITC (Eligible ITC in 2A + 20%)	Actual ITC which can be claimed
I	10,00,000/-	6,00,000/-	7,20,000/-	7,20,000/-
II	10,00,000/-	7,00,000/-	8,40,000/-	8,40,000/-
III	10,00,000/-	8,50,000/-	10,20,000/-	10,00,000/-*

ISSUES

- 36th GST Council meeting objective
 - Matching
 - Regularizing the filing
 - Minimize fake credits
- Matching as enshrined in the Act
 - Sec. 38(1)/(3)
 - (1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52, shall verify, validate, modify or delete,.....
 - (3) The details of supplies modified, deleted or included by the recipient
 - Sec. 41 – provisional ITC – Sec. 42/43 – Matching
 - Sec. 16(2) – Eligibility of ITC – based on return filed u/s 39
- Can a pseudo matching not following principles of natural justice be inserted by way of a delegated legislation ?
 - Rule cannot supplant the Act
 - Subhash Chand Aggarwal vs Union Of India (Del.)
- Sec. 43A – New return filing system – Also provides for claim of missed invoices on provisional basis with the facility to report
- Can the guilty go scot-free and the bonafide be punished ?

ISSUES

- Attribution of ITC claimed within 10%
- Time dimension
- Quarterly filers
- Date of comparison
- ITC taken in violation of the Rule eventually reflected – Sec. 16(2) fulfilled
- Circular going beyond the Rule
 - CCE v. Ratan Melting & Wire Industries (2008) 231 ELT 22

RULE 36(4)

- **How will the said restriction be enforced ?**
 - Self-assessment basis
- **From which date will the restriction be applicable ?**
 - Apply only on the invoices / debit notes on which credit is availed after 09.10.2019
- **Which eligible ITC as per books is to be compared with the permissible ITC as per the new sub-rule ?**
 - Import, documents issued under RCM, credit received from ISD etc. is outside the ambit of the sub-rule
- **Whether the ineligible ITC reflected in GSTR – 2A would also be considered for deriving the permissible ITC ?**
 - Restrict availment of ITC beyond 20% of the eligible ITC reflected in GSTR – 2A

RULE 36(4)

- **Whether the restriction is to be calculated supplier wise or on consolidated basis ?**
 - Calculation would be on consolidated basis for the given tax period.
- **On which date the eligible ITC in 2A is to be seen to calculate the permissible ITC ?**
 - Amount of eligible ITC for computing the permissible ITC has to be seen as per GSTR – 2A available on the due date of filing of the returns in FORM GSTR-1 of the concerned suppliers.

RULE 36(4)

- **How to subsequently avail the ITC restricted in a particular tax period ?**

Tax period	Oct, 19	Nov, 19
ITC as per books	10,00,000	12,00,000
Eligible ITC as per 2A	6,00,000	2,00,000 (for Oct 19) & 9,00,000 (for Nov 19)
Permissible ITC	7,20,000 (6,00,000 + 20%)	2,40,000 (for Oct 19 – 2,00,000 + 20%) & 10,80,000 (for Nov 19 – 9,00,000 + 20%)
Restricted ITC	2,80,000	40,000 (for Oct 19) & 1,20,000 (for Nov 19)

RULE 36(4)

- **Whether time dimension is relevant for implementing the said sub-rule ?**
- Circular indirectly provides for the invoice level matching for computing the restricted ITC and its subsequent availment with 20% tolerance limit.

RULE 36(4)

- **How to account for ITC flowing from quarterly filers ?**
 - A view can be taken that similar to ISD invoices (as permitted by the circular), even ITC pertaining to quarterly return filers can be fully taken.
- **In absence of a detailed log of GSTR – 2A, how to compute the eligible ITC ?**
 - In absence of any log, how will the tax payer (if forgets to download 2A on 11th) or the department enforce such restriction as the same is qua the eligible ITC as on the due date ?

RULE 36(4)

- **Vires of the sub-rule**

- Article 14 of the Constitution of India
- Sec. 16(1) permits imposition of restriction only qua the tax charged on a particular supply
- Sec. 43A has not yet been notified.
- As GSTR – 3B is considered as GSTR – 3, it shall be deemed that the matching visualized u/s 41, 42 & 43 has been done away with.

- **Vires of the Circular**

- CCE v. Ratan Melting & Wire Industries (2008) 231 ELT 22
- “Subject to” – “conditional upon” K. R. C. S. Balakrishna Chetty & Sons v. State of Madras (1961 AIR 1152)
- Circular therefore providing for the application of the sub-rule qua every tax period by considering the GSTR – 2A on the 11th of the concerned subsequent month is clearly going beyond the provisions of the sub-rule.

COVID - 19

- Due to COVID – 19 it is quite possible that many suppliers may delay in filing GSTR – 1. Also GSTR – 1 filing may happen by 30th June whereas GSTR – 3B filing will happen before the said date in major cases. Hence the application of the Rule 36(4) on monthly basis for the period February, March, April, May, June, July and August, 2020 would become very difficult.
- Hence Rule 36(4) has been amended vide Notification No. 30/2020 – Central Tax to provide that the said 10% restriction would be calculated on cumulative basis for the period February, March, April, May, June, July and August, 2020 and not on monthly basis. Therefore ITC restricted, if any, on such cumulative working would be given effect in the GSTR – 3B which is filed for the month of September, 2020.

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.

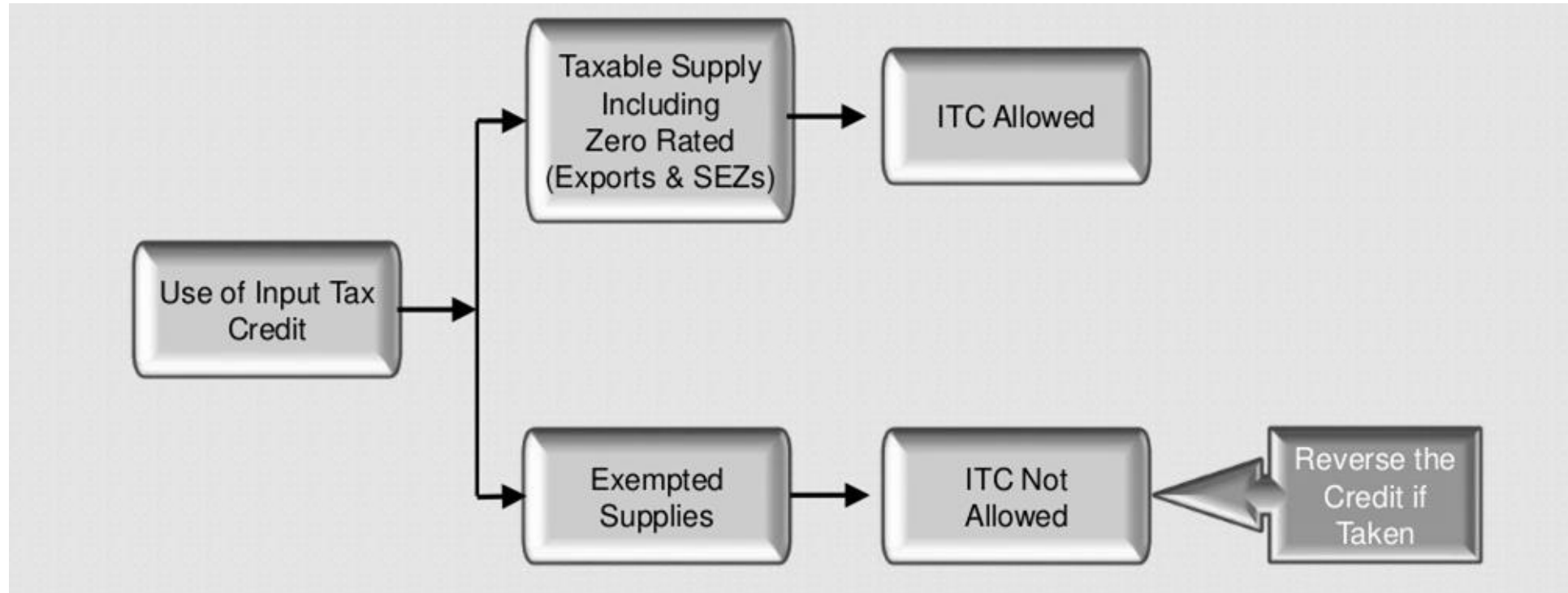
MEANING

- Sec. 2(47)
 - “exempt supply” means supply of any goods or services or both which attracts *nil* rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes non-taxable supply
- Sec. 11(1)
 - Where the Government is satisfied that it is necessary in the public interest so to do, it may, on the recommendations of the Council, by notification, exempt generally, either absolutely or subject to such conditions as may be specified therein, goods or services or both of any specified description from the whole or any part of the tax leviable thereon with effect from such date as may be specified in such notification.
 - Nil rated vs. Exempt (e.g. NN 11/2017 vs. 12/2017)
- Sec. 2(78)
 - “non-taxable supply” means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;
 - Sec. 9(1) - alcoholic liquor for human consumption
 - Sec. 9(2) - petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel

VALUE OF EXEMPT 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.
 - **Explanation.** — For the purposes of this sub-section, the expression “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

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

- Whether interest income to be considered for determining the value of exempt supply:
- Explanation 1 to Rule 43 inserted vide Notf no. 03/2018 – CT dt. 23.01.2018 – 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
- Above explanation is only for the purpose of excluding from the value. Will it mean that the interest income is not an exempt supply ? What about ITC exclusively attributable to such supply ?
- What can be the stand in case of dividend income ?

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).

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)
 - $C2 = C1 \text{ (i.e. } T - (T1 + T2 + T3)) - T4$
 - 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.

ISSUES

4. Eligible ITC

Table 4 of GSTR 3B

Details	Integrated Tax	Central Tax	State/UT Tax	Cess
1	2	3	4	5
(A) ITC Available (whether in full or part)				
(1) Import of goods				
(2) Import of services				
(3) Inward supplies liable to reverse charge (other than 1 & 2 above)				
(4) Inward supplies from ISD				
(5) All other ITC				
(B) ITC Reversed				
(1) As per rules 42 & 43 of CGST Rules				
(2) Others				
(C) Net ITC Available (A) – (B)				
(D) Ineligible ITC				
(1) As per section 17(5)				
(2) Others				

ISSUES

- Rule 43
 - Applies to cases covered u/s 17(1) as well as 17(2).
 - Is with respect to ITC availed on capital goods.
 - Useful life assumed to be 60 months.
 - Avail entire amount first and then reverse on monthly basis.
 - Amount to be reversed to be added to output tax liability with interest.
 - No end of FY recalculation as the reversal is based on useful life on monthly basis.

ISSUES

- Sec. 17(4) - Banking company or a financial institution including a non-banking financial company
 - 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 shall have the option to either comply with the provisions of sub-section (2), or avail of, every month, an amount equal to fifty per cent. of the eligible input tax credit on inputs, capital goods and input services in that month and the rest shall lapse:
 - Provided that the option once exercised shall not be withdrawn during the remaining part of the financial year:
 - Provided further that the restriction of fifty per cent. shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number.

ISSUES

- Real Estate Sector
- FY wise reversal (to be done only from the year in which project is complete) upheld:
 - Alembic limited, (Gujarat)
 - Prajapati Developers, Hyderabad CESTAT
 - TPL Developers, Bangalore CESTAT
- RODO-4/2019
 - Reversal to be done for project based on carpet area sold before OC (taxable) and sold after OC (exempt). Applicable only for project completed after 31/03/19
 - CGST Rule 42 and 43 amended. (NN 16/2019-CT)
 - Above decisions are now overruled w.e.f. 1st April 2019.
 - Shall apply to all REP as well as RREP not converted into the new scheme.

ISSUES

- Final amount of eligible ITC to be determined in the year of completion of the project.
 - Shortfall to be reversed with interest from April till date of pmt.
 - Excess to be availed before the said due date.
 - Shall entail lots of guessing.
- Common ITC across projects to be attributed on “reasonable” basis.

ISSUES

- Interest
- J.K. Synthetics Ltd vs Commercial Taxes Officer 1994 AIR 2393
 - But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount.
- Indian Carbon Limited and Others v. State of Assam AIR 1997 SC 3054
 - There being no substantive provision in the Central Act requiring the payment of interest on Central sales tax the States' sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central sales tax, charge interest thereon.

ISSUES

- ROD 4/2019
 - For the removal of difficulties, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, the amount of credit attributable to the taxable supplies including zero rated supplies and exempt supplies shall be determined on the basis of the area of the construction of the complex, building, civil structure or a part thereof, which is taxable and the area which is exempt.
- Sec. 172
 - If any difficulty arises in giving effect to any provisions of this Act, the Government may, on the recommendations of the Council, by a general or a special order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act or the rules or regulations made thereunder, as may be necessary or expedient for the purpose of removing the said difficulty

SUPPLIES SUBJECT TO CONDITION

- NN 11/2017 – CT(R)
 - (iv) Wherever a rate has been prescribed in this notification subject to the condition that credit of input tax charged on goods or services used in supplying the service has not been taken, it shall mean that,- (a) credit of input tax charged on goods or services used exclusively in supplying such service has not been taken; and (b) credit of input tax charged on goods or services used partly for supplying such service and partly for effecting other supplies eligible for input tax credits, is reversed as if supply of such service is an exempt supply and attracts provisions of sub-section (2) of section 17 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder.
- Sec. 17(3) – value of exempt supplies to be prescribed
- Sec. 2(87) – “prescribed” by rules

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

- Chowgule Industries Private Limited (GST AAR Goa)
 - The taxable supply includes further supply of such vehicles. The demo vehicles are being used only for a specified period. Later on when the demo vehicles are sold at the written down value GST is charged at applicable rate at that point of time. The GST Act does not prescribe the time within which time further supply is to be effected. Hence the provision of section 17(5) will not be applicable. The applicant is entitle for input tax credit on Demo 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)**
- (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.

RULE 86A

- Rule 86A came to be inserted vide Notf no. 75/2019 – CT dt 26.12.2019
- Generic rulemaking power contained u/s 164 of the CGST Act, 2017
- Sec. 49(4) of the CGST Act, 2017 provides that the amount available in the electronic credit ledger may be used for making any payment towards output tax in such manner and subject to such conditions and within such time as may be prescribed.
 - The power granted by Sec. 49(4) is only to prescribe the procedural conditions enabling the utilization of the balance and cannot be interpreted to restrict its utilization of the ITC duly availed following the law.

RULE 86A

- Vasantlal Maganbhai Sanjanwala vs The State Of Bombay 1961 SCR (1) 341
 - The delegation by an Act can be proper only if the same is done by setting the proper framework and guidance within which the delegated authority can exercise the power. Improper exercise of a vague and arbitrary power to change the policy of the Act (in the present case without challenging the availment of ITC by following the principles of natural justice in the form of SCN but straight away blocking the utilization of the balance) would be a case of excessive delegation not permitted in law.

RULE 86A

- *Rule 86A(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible inasmuch as –*
- *.....*
- *may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount”*

RULE 86A

- Union Of India vs Mohan Lal Capoor & Others 1974 SCR (1) 797 (SC)
 - reasons are the links between the materials on which certain conclusions are based and the actual conclusions.
- Ajantha Industries And Ors vs Central Board Of Direct Taxes 1976 SCR (2) 884 (SC)
 - the requirement of recording the reasons as a matter of principle of natural justice would also encompass the requirement of communicating such reasons to the taxpayer to enable the taxpayer who is prejudicially affected to challenge the decision.

RULE 86A

- Circumstances discussed would not ipso facto authorize invocation of the rule unless it has been established that the ITC in the given situations has been fraudulently availed or is ineligible.

RULE 86A

Clause	Circumstances	Remarks
(a)(i)	the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 - (i) issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained or	It must be shown from the facts that the supplier is non-existent or not conducting business from his registered place.
(a)(ii)	without receipt of goods or services or both	It must be shown from facts that goods or services have not been received and ITC has been availed.
(b)	the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government	As discussed earlier mere non-payment of tax by the suppliers cannot disentitle the ITC in an otherwise genuine transaction. Courts in the pre-GST era have read down the actual payment condition and applied only in non-genuine cases. Therefore as mere non-payment cannot make the ITC ineligible we are of the view that said clause can be invoked only if it has been found that the transaction was not genuine.

RULE 86A

Clause	Circumstances	Remarks
(c)	the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained	The taxpayer whose credit ledger is sought to be blocked should be found to be non-existent or not conducting business from the registered place of business.
(d)	the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36	It must be shown that the given documents are not available in respect of which ITC has been availed.

THANKS !!

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