

# Issues on Input Tax Credit under GST

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AN OVERVIEW OF THE RECENT DEVELOPMENT IN GST RELATED TO ITC

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## SPEAKERS

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# Agenda

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- Availment of ITC in case tax not deposited by supplier
- Burden of Proof for availing ITC
- Reversal of ITC on non-payment of consideration within 180 days
- Insertion of Rule 37A for Reversal of ITC
- ITC on employee welfare expenses
- ITC on sales promotion items
- ITC on assignment of leasehold rights in land/leasing of land
- Pre-Deposits under GST through ITC
- Q&A

# Legal provisions related to Input Tax Credit

# Availment of ITC in case tax not deposited by supplier

# Section 16(2)(c)

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- Non-obstante clause imposing certain conditions for availment of ITC:
  - Subject to Section 41,
  - the tax charged for a particular supply,
  - has actually been paid to the Government,
  - either through cash or through utilization of ITC.

# Press Release dated 04.05.2018

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- Government Press Release dated 04.05.2018 issued on 'Return Simplification'.
- Specified that no automated reversal can be initiated against the buyer on non-payment by the supplier.
- Recovery must be first made from seller.
- Exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets, etc.

# Press Release dated 18.10.2018

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- Press Release dated 18.10.2018 provided for last date to avail ITC for invoices or debit notes pertaining to period from July, 2017 to March, 2018.
- CBIC clarified that furnishing FORM GSTR-1 by the supplier and the facility to view the same in FORM GSTR—2A by the recipient is in nature of tax facilitation
- It doesn't impact ITC availment on self- assessment basis in according of Section 16.

# On Quest Merchandising India Pvt. Ltd v. Government of NCT of Delhi & Ors.

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- Judgement dealing with Section 9(2)(g) of Delhi VAT which is analogous to section 16(2)(c) of the CGST Act.
- Section 9(2)(g) provided that no credit shall be allowed to the dealers or class of dealers unless the tax paid by purchasing dealer actually been deposited by the selling dealer with the Government or has been successfully adjusted against output tax liability.
- The constitutional validity of Section 9(2)(g) was challenged before Delhi HC..
- The Delhi HC held that the said provision does not differentiate between bona fide purchaser and those that are not, The benefits of ITC cannot be denied to bona fide purchaser only because of default on part of the seller dealer. Thus, this measure being arbitrary, irrational and unduly harsh and therefore violative of Article 14 of the Constitution and accordingly read it down as not including purchasing dealer who had bona fide entered into purchase transactions



# Mahalaxmi Cotton Ginning Pressing and Oil Industries v. State of Maharashtra

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- Section 48(5) of the Maharashtra VAT also contained similar provisions.
- It provided that in no case would the amount of set off or refund on any purchase of goods exceed the amount of tax in respect of the same goods, actually paid, if any under the Act or any earlier law into the Government Treasury.
- The constitutional validity of the said provision was challenge before the Bombay HC.
- The Hon'ble court held that the liability to pay tax is that of the selling dealer and in granting a set-off, the legislature can impose conditions and that the conditions imposed in Section 48(5) are not lacking in rationality.

# Relevant Judicial Pronouncement in VAT Regime

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- Punjab & Haryana HC in case of ***Gheru Lal Bal Chand v. State of Haryana***, while dealing with the issue of claim of ITC where seller hasn't paid the tax to Government, held that no liability can be fastened on the buyer for non-payment of tax by the seller unless it is fraudulent, or collusion or connivance with the seller. Thus, upheld the validity of section 8(3) of the Haryana VAT.
- Jharkhand HC in case of ***M/s Tarapore & Company v. The State of Jharkhand***, in context of Jharkhand VAT held that ITC can't be denied to the purchasing dealer on the ground that no tax has been paid to the Government by the seller, when acting in a bonafide manner.

# Relevant Judicial Pronouncement in VAT Regime

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- The Apex Court in case of ***CCE v. Kay Kay Industries***, held that it would be practically impossible for the recipient to verify whether the duty has been paid by the supplier, thus, the credit cannot be denied to the recipient even if the supplier hasn't duly paid duty.
- The Madras HC in case of ***Shri Ranga Valves (P.) Ltd. v. Asst. Commissioner (CT), Coimbatore***, held that the credit cannot be restricted to the buyer on failure of seller to pay tax to the government, in case where seller has collected tax and issued invoices to the buyer.

## Relevant Judicial Pronouncement under GST Regime

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- The Madras HC in case of **M/s D.Y. Beathel Enterprises v. The State Tax Officer (Data Cell)**, quashed recovery of ITC from buyer for non-payment by seller on the ground that the orders suffered from fundamental flaws of non-examination of seller in the enquiry and non-initiation of recovery action against seller in the first place..
- The Madras HC in case of **Pinstar Automotive India Pvt. Ltd. v. Add. Commissioner, Chennai**, held that a mechanism must be put in place to address the issue of casting substantive liability on the supplier and protective liability on the purchaser. Double benefit should not flow to the revenue.

# Burden of Proof for availing ITC

# The State of Karnataka v. Ecom Gill Coffee Trading Pvt. Ltd.

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- The SC in this case clarified the scope of section 70 of KVAT, 2002 regarding the burden of proof for availing credit.
- The Hon'ble Court made certain pertinent observations regarding the said provision:
  - Mere claim by dealer that they are a bonafide purchase, isn't sufficient for claim of ITC.
  - The burden of proof remains upon the dealer claiming such credit and cannot be shifted to the revenue.
  - The dealer claiming credit needs to prove beyond doubt.
  - Proving genuineness of transaction and actual physical movement of goods is *sine qua non*.
  - Failing to do so, would lead to justified rejection of credit claim by AO.

# Impact of Ecom Gill Judgment

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- Section 155 of CGST Act similar to section 70 of KVAT providing for burden of proof bestowed upon the person claiming credit.
- Now, Assessee required to furnish details/documents to prove genuineness of the transaction and physical movement of the goods for proving credit eligibility.
- This judgment is not precedent to issue of credit being denied on account of non-payment of tax by the supplier.
- This just provides for documents required for establishing the credit eligibility by the Assessee.
- **Issue: Whether an Assessee who discharges the burden of proof for availing credit by producing the documents/details would be eligible to credit if the supplier has not paid tax to the Government.**

# Reversal of ITC on non-payment of consideration within 180 days



# Reversal of ITC on non-payment of Consideration within 180 days

Notification No. 26/2022- Central Tax dated 26.12.2022 w.e.f. 26/12/2022

- Amendment in Rule 37(1) of the CGST Rules as mentioned below:

## AMENDED ENTRY

### 37. Reversal of input tax credit in the case of non-payment of consideration.-

(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 [**whether wholly or partly**] along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of section 16, shall pay [**or reverse**] an amount equal to the input tax credit availed in respect of such supply [**proportionate to the amount not paid to the supplier**] 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.

# Example

- X supplied Y for INR 100 + 18 (on account of 18% GST).
- What will be the reversal as per second proviso to Section 16(2) read with Rule 37(1) in:

VALUE OF INVOICE PAID (INR)	COMMENT
80 + 18	Commercial Discount
80 + 18	INR 20 towards value of supply not paid
80	Bifurcation of INR 80 paid between value & GST not available

# Insertion of Rule 37A for Reversal of ITC

# Reversal of ITC in case of Non-Payment of Tax by the Supplier and Re-availment thereof

Notification No. 26/2022- Central Tax dated 26.12.2022 w.e.f. 26/12/2022

## PROVISION

### 41. Availment of input tax credit

(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.

# Reversal of ITC in case of Non-Payment of Tax by the Supplier and Re-availment thereof

Notification No. 26/2022- Central Tax dated 26.12.2022 w.e.f. 26/12/2022

## INSERTED PROVISION

### **Rule 37A. Reversal of input tax credit in the case of non-payment of tax by the supplier and re-availment thereof:-**

Where input tax credit has been availed by a registered person in the return in FORM GSTR-3B for a tax period in respect of such invoice or debit note, the details of which have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility, but the return in FORM GSTR-3B for the tax period corresponding to the said statement of outward supplies has not been furnished by such supplier till the 30th day of September following the end of financial year in which the input tax credit in respect of such invoice or debit note has been availed, the said amount of input tax credit shall be reversed by the said registered person, while furnishing a return in FORM GSTR-3B on or before the 30th day of November following the end of such financial year.

Provided that where the said amount of input tax credit is not reversed by the registered person in a return in FORM GSTR-3B on or before the 30th day of November following the end of such financial year during which such input tax credit has been availed, such amount shall be payable by the said person along with interest thereon under section 50.

Provided further that where the said supplier subsequently furnishes the return in FORM GSTR-3B for the said tax period, the said registered person may re-avail the amount of such credit in the return in FORM GSTR-3B for a tax period thereafter.

# Open Issues

- The onus is upon recipient to check the filing status of GSTR- 3B on part of defaulting suppliers, unless the default is made good?
- In a situation wherein, Supplier has filed GSTR- 3B with part-payment of tax, then how to determine ITC to be availed by the recipient?

FOR INSTANCE	AMOUNT (INR)
Liability in Supplier's GSTR-1	100
Liability paid through Supplier's GSTR- 3B	70
Supply made to Recipient X	20
<b>POSSIBLE SCENARIOS FOR AVAILING / REVERSAL OF ITC</b>	
On Pro-Rata basis - $\{(20*70)/100\}$	14
Tax liability against supply to X entirely covered	20
Tax liability against supply to X not covered	0

# Open Issues

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- Whether time limitation under Section 16(4) for availment for ITC shall be applicable for re-availment under Rule 37A?
- Section 50 of the CGST Act provides interest on wrongful availment and utilization of ITC as a threshold for levy of interest versus Rule 37A which levies interest on mere availment of ITC?
- No specific provision for re-availment of credit in case wrong details filed in GSTR-1 by supplier due to which tax not reflecting in GSTR-2B of recipient

# Open Issues

- How to compute interest?

FOR INSTANCE	AMOUNT (INR)
01. 03. 2023 - ITC Availed	100
01. 06. 2023 - ITC Utilized	70
10. 12. 2023 - Reversal of ITC due to non-payment of tax by the supplier	100
<b>IF INTEREST IS LEVIED, IT SHALL BE CALCULATED FROM WHICH DATE:</b>	
1	From 30. 11. 2023 to 10. 12. 2023
2	From 01. 03. 2023 to 10. 12. 2023
3	From 01. 06. 2023 to 10. 12. 2023

**Note:** Whether any interest will be attracted if ITC availed is utilized by the recipient before 30.11.2023; For example, if the ITC was duly reversed on 28.11.2023 by the recipient, whether the recipient will be required to pay interest?



# ITC on employee welfare expenses

# Relevant Provision

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- Section 17(5)(b) of the CGST- Blockage of ITC on following goods or services or both:
  - Food and beverages, **outdoor catering**, beauty treatment, health services, cosmetic and plastic surgery, **leasing, renting or hiring of motor vehicle**, vessels or aircraft
  - Provided that ITC will be available in respect of aforesaid goods or services, where it is **obligatory for an employer to provide the same to its employee** under any law.
  - Provided that ITC will be available in respect of aforesaid goods or services where it is used for making outward supply of **same category of goods or services**

# ITC eligibility on catering services

- CBIC issued **Circular No. 172/04/2022- GST dated 06.07.2022** clarifying that the prerequisites provided by the employer to its employee in terms of contract entered between them is not subjected to GST.
- Certain possible scenarios on availability of ITC on canteen services are tabulated below:

Facts	Amount charged by canteen contractor	Employer	Employee
Entire recovery by contractor from employer, no recovery by employer from employee	Rs. 100/ plate	Rs. 100	Rs. 0
Entire recovery by contractor from employer, subsequently partial recovery by employer from employee	Rs. 100/ plate	Rs. 90	Rs. 10

# ITC eligibility on transportation services

- Certain possible scenarios on availability of ITC on supply of services by way of transportation are tabulated below:

Facts		Amount charged by motor vehicle contractor	Employer	Employee
Entire recovery by contractor from employer, no recovery by employer from employee	recovery	Rs. 100/ person	Rs. 100	Rs. 0
Entire recovery by contractor from employer, frequently nominal recovery by employer from employee ( <b>seating capacity is less than 13 persons</b> )	sub-recovery	Rs. 100/ person	Rs. 90	Rs. 10
Entire recovery by contractor from employer, frequently nominal recovery by employer from employee ( <b>seating capacity is more than 13 persons</b> )	sub-recovery	Rs. 100/ person	Rs. 90	Rs. 10

# ITC on sales promotion items

# Relevant Provision

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- Section 17(5)(h) of the CGST Act- Blockage of ITC on goods
  - lost, stolen, destroyed, written off or disposed of by way of gift or free samples.
- Schedule I of the CGST Act specifies that permanent transfer or disposal of business assets where input tax credit has been availed on such assets will qualify as supply even if made without consideration.

# Gifts

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- Section 17(5)(h) of the CGST Act specifies that ITC on any goods disposed as gifts cannot be availed.
- Reversal of ITC on goods disposed off as gift.
- Gift is not defined under CGST Act. Section 122 of TP Act defines 'gift' as:
  - Transfer of existing moveable or immovable property made **voluntary** and **without any consideration**
- Further, CBIC **Press Release dated 10.07.2017** clarifies that 'gift' as understood in common parlance is **made without consideration, voluntarily** and **occasionally.**

# Case Study

- Whether ITC will be available in the following scenarios:

S. No.	Scenarios
1.	Foreign trips to dealers on completion of targets
2.	Pens, diaries, caps and other small value items given to dealers
3.	Signboards, catalogues, leaflets
4.	Gifts received by redemption of loyalty points



# ITC on assignment of leasehold rights in land/leasing of land

# Assignment of leasehold rights in land

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- Section 7(1) of CGST Act provides that supply of goods or services includes all forms of supply such as sale, transfer, **lease**, etc., made for consideration by a person in course or furtherance of business.
- Entry 5 of Schedule III of the CGST Act provides for sale of land, building shall neither be treated as supply of "goods" nor as "services."

# Relevant Provision relating to ITC

## Section 17(5)(c) & (d) of CGST Act

ITC is ineligible in respect of:

1. works contract services
2. goods or services



Used in the **“construction” of immovable property** (other than P&M)

Construction **includes:**

- a. Re-construction,
- b. Renovation,
- c. Additions/alteration/repairs



to the **extent of capitalisation** to the said immovable property

# Case Study

- Whether ITC on GST paid on assignment of leasehold rights/lease will be available in the following scenarios:

S. No.	Scenarios
1.	<b>Demolish the current building structure and construct a new building for the factory</b>
2.	<b>Construct a new building on existing empty space</b>
	a) Construction of new building on a certain portion of leasehold land
	b) Portion of land used for construction of P&M
3.	<b>Production Activities in the occupied building after completion of repair work</b>
	a) Existing building if the same is repaired
	b) Inputs goods and services used for repairs of the building

# Pre-Deposits under GST through ITC

# Electronic Credit Ledger for Pre-deposit

- **Issue: Whether payment of pre-deposit can be made using ITC in electronic credit ledger under GST and erstwhile regimes?**
- Different various HC has considered this issue:
  - Orissa HC in ***Jyoti Construction v. Deputy Commissioner***, disallowed the use of electronic credit ledger while observing that pre-deposit would not qualify as ‘output tax’ under GST ACT.
  - However, Allahabad HC in ***Tulsi Ram & Company v. Commissioner*** and Bombay HC in ***Oasis Realty v. UOI***, have allowed the use of electronic credit ledger for the mandatory payment of pre-deposit for filing an appeal.

# Electronic Credit Ledger for Pre-deposit

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- CBIC Instruction prescribed FORM GST APL-01 for payment of pre-deposit for filing an appeal under GST.
- Serial No. 15 of FORM GST APL-01 provides for details of payment of admitted amount and pre-deposits which allows payment by electronic credit ledger.
- However, CBIC Instruction specifies that pre-deposit is a requirement of right of appeal and is neither in nature of duty nor arrears under existing law.

Q/A



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