



Full coverage of issues related to

ITC IN GST

By Adv. Pawan Arora
(Partner at Athena Law Associates)



5+ Hours in 4 Sessions | Starting from 1st June 2021 - 5 PM To 6 PM





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Brief Profile of the Faculty

Adv. (CA) Pawan Arora

- ❖ B. Com, CA and Law Graduate. Practising as Advocate.
- ❖ He has more than 10 Years of relentless and steady experience of Advisory and Litigation matters in Indirect Taxation and handled matters of clients from diverse industries and his field of specialization is Indirect Taxes.
- ❖ He has also worked in multinational companies at managerial positions handling their Indirect Taxation and has been instrumental in re-designing their tax policies and streamlines their systems from indirect tax perspective. During his tenure in the Industry, he gained vast experience of in-house consultancy on Indirect Tax issues.
- ❖ He is a frequent Speaker in GST Workshops/Seminars organized by tax departments, CAG, NICF, PHD Chamber of Commerce and professional forums including Study Circles of CA Institute. He also provides GST Trainings to personnel of Corporates.
- ❖ He is leading Kirti Nagar Branch (Delhi) of the Firm, Athena Law Associates.



Session -1

INPUT TAX CREDIT SECTION 16 AND RULE 36 & 37

By: Adv. (CA) Pawan Arora

Partner, Athena Law Associates

01st June 2021



Section 16(1)

Section 16 CGST Act, 2017

Eligibility and conditions for taking input tax credit –

(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.

Points for Deliberation

- **Every Registered Person** – plethora of favorable cases in previous tax regime in absence of this word in Cenvat Credit Rules, 2004

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- **used or intended to be used in the course or furtherance of his business** – Judgments on definition of Input Service under CCR prior to its amendment – Courts has interpreted the term for business very widely.
- Fate of ITC restricted through Tax Rate Notification like Real Estate, Restaurant Services etc.
 - Notification can be challenged through Writ
 - Avail the ITC and either keep unutilized or reverse under protest.

Section 16(2)

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

- (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;
- (b) he has received the goods or services or both.

[Explanation.— For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—

- (i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;
- (ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person;]

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- **possession of a tax invoice or such other tax paying documents as may be prescribed** – Since introduction of GST asking to ensure that RCM invoices are issued on goods/ services received from unregistered person. Although non issuance of self invoicing is a procedural lapse, but department has started to deny ITC on this ground.
- **he has received the goods or services or both** – Very Technical to look this compliance in case of services e.g. Air Ticket/ Hotel booked in advance.

Section 16(2)(c)

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply;

- **the tax charged in respect of such supply has been actually paid to the Government**

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- **Before denying credit to buyer, catch/enquire the Supplier at first place – Madras High Court**
 1. Section 16(2)(c) of CGST Act, provides that tax has been actually paid to the Government as condition for claiming Input Tax Credit by buyer.
 2. During VAT regime multiple High Courts have held that if seller has not paid the tax, credit cannot be denied to buyer specially where transaction is bonafide.

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3. Recently the Hon'ble Madras High Court in the matter of *D.Y. Beathel Enterprises, 2021-TIOL- 890-HC-MAD-GST* has held as under:

- a. Proposition laid down in the context of the previous tax regime may not be straight-away applicable to the current tax regime.
- b. 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.
- c. Order demanding reversal of ITC from purchaser must be quashed due to following reasons:
 - Non-examination of Supplier in the enquiry
 - Non-initiation of recovery action against Supplier in the first place

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Author's Comment

- Two important observations are given by the Hon'ble High Court:
 - The Court has not straight-away accepted the proposition laid down by the Courts during VAT regime. Further, the Court after reading Section 16 has held that if the tax is not paid to the Government, that has to be borne by either of the party i.e., seller or buyer.
 - Nonetheless the Court has given relief to the buyer that seller must be examined in such cases and recovery proceedings must be initiated against seller at first place.
 - The relief given in the judgment is one step in favour of genuine buyers.
 - Food for thought : How to enforce this judgment in case of Inter-State transaction where Supplier will be under different jurisdiction of SGST department ?

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- **INPUT TAX CREDIT : Mismatch in GSTR-3B Vs. GSTR-2A/2B : Rule 36(4)**

Whether ITC can be denied merely on the ground of mismatch between ITC claimed in GSTR-3B and reflected in GSTR-2A/2B ?

1. From last one year, discrepancy notices in GST ASMT-10 have been issued by GST department of almost all States. The said Notice sought explanation from the Assessee for difference between ITC claimed in GSTR-3B and ITC available in GSTR2A. Thus, a question may arise that whether ITC can be denied merely on the ground of mismatch between ITC claimed in GSTR-3B and reflected in GSTR-2A/2B?
2. Mechanism provided under Section 42 r/w Rule 69 for matching of ITC is not into effect. Section 43A provides for procedure of availment of credit in a prescribed manner (manner to be provided by Rules). Rule 36(4) was inserted w.e.f. 09.10.2019. Thus, effectively no matching of ITC was required upto 08.10.2019.

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3. CBIC in Press Release dt. 18.10.2018 clarified that:

“Furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis”.

4. Rule 36(4) inserted w.e.f. 9th October 2019 and is applicable on the invoices on which credit is availed after the said date. Presently as per Rule 36(4) Input Tax Credit can be availed upto 105% of GST paid on inward supplies the details of which are uploaded by Supplier on GSTN Portal and reflected in GSTR 2A/2B of the recipient in a tax period.

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5. Writ Petitions have been filed by taxpayers to challenge condition of Rule 36(4) on one of the grounds that the said condition is imposed through Rules only and is not provided under the CGST/SGST Act. It is to be noted that Section 43A provides for only PROCEDURE of availing credit in a prescribed manner. It does not empower the Government to provide any restrictions on availment of ITC through Rules.
6. Section 16(2) of the CGST Act provides the conditions to avail the ITC. A new condition is inserted under said Section vide Finance Act 2021, quoted as under:

(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37.

* The above condition [Section 16(2)(aa)] is yet to come into effect.

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Author's Comment

7. At least upto 08.10.2019, ITC cannot be denied merely on the ground of mismatch between ITC in GSTR-3B and GSTR-2A.
8. Rule 36(4) is inserted without any authority of law. Newly inserted Section 16(2)(aa) is yet to be made effective. Thus, for the period post 08.10.2019, plea can be taken that credit cannot be denied merely on the ground of mismatch of credit.
9. However, it is advisable to ensure filing of GSTR-1/ IFF and GSTR-3B from the Supplier to avoid any unnecessary litigation.

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Section 16(2)(d)

(d) he has furnished the return under section 39: Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

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.

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Points for Deliberation

- Fails to pay means when due but not paid. Language is different from second proviso to Rule 4(7) of CCR “...*payment...is not made within three months*”
- Not Applicable on supplies on which tax is payable on reverse charge basis
- Interest is payable from the date of availment – different from CCR
- Deemed Supply – Deemed Payment
- Deemed Addition in Value under Section 15(2)(b) – Deemed to be paid.
- No limit of Section 16(4) shall be applicable for Re-availment of ITC after payment to Supplier

Section 16(3)

(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, the input tax credit on the said tax component shall not be allowed.

➤ **If ITC is eligible – Better to avail ITC than claiming Depreciation**

Section 16(4)

(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.]

ITC: CGST + SGST paid in other State

- **Whether tax paid in one state is allowed as credit in other State**
 - i. Input tax is defined u/s 2(62) to mean Central Tax, State Tax, Integrated tax and Union Territory Tax
 - ii. Input Tax credit is defined u/s 2(63) to mean credit of input tax
 - iii. State tax is defined u/s 2(104) to mean the tax levied under *any* State Goods and Services Tax
 - iv. Thus, credit of input tax would include credit of any State tax paid on inward supplies.
 - v. Section 16(1) uses the words *credit of input tax charged*. Thus, unless expressly restricted elsewhere in the GST Law, Section 16(1) of the CGST Act allows credit of all taxes levied under CGST Act, IGST Act, UTGST Act and all State SGST Acts irrespective of the “place of supply”.

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- vi. Section 41(1) of CGST Act entitles every registered person, subject to conditions and restrictions as may be prescribed, to take credit of eligible input tax on self-assessment basis and the same shall be credited to his ECL on a provisional basis.
- vii. Rule 86(1) provides that every claim of ITC **under the Act** shall be credited to Electronic Credit ledger
- viii. ITC on inward supplies having place of supply outside the state where a person is registered is not restricted under any provision of the CGST Act. Since the credit of such input taxes are not restricted under the CGST Act or rules made thereunder, ITC of the same shall be available under the CGST Act.

Rule 36

(36) Documentary requirements and conditions for claiming input tax credit.-

(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,-

- (a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;
- (b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;
- (c) a debit note issued by a supplier in accordance with the provisions of section 34;
- (d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;
- (e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54. .

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(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document, and the relevant information, as contained in the said document, is furnished in FORMGSTR-2 by such person:

Provided that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.

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(3) No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been [furnished]⁶¹ by the suppliers under sub-section (1) of section 37, [in FORM GSTR-1 or using the invoice furnishing facility] ⁶² shall not exceed [5 per cent.] ⁶³ of the eligible credit available in respect of invoices or debit notes the details of which have been [furnished]⁶⁴ by the suppliers under sub-section (1) of section 37 [in FORM GSTR-1 or using the invoice furnishing facility].

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Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.

Provided further that the such condition shall apply cumulatively for the period April and May, 2021 and the return in FORM GSTR-3B for the tax period May, 2021 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.

Rule 37

(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, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16, shall 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:

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Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:

Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.

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(2) The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.

(3) The registered person shall be liable to pay interest at the rate notified under sub-section (1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.

(4) The time limit specified in sub-section (4) of section 16 shall not apply to a claim for availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier.



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