

Burning Issues Under



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**WHETHER INTEREST IS
PAYABLE ON GROSS TAX
LIABILITY OR NET TAX
LIABILITY?**

CASE STUDY



January:

Output tax – Rs. 2,00,000, ITC – Rs. 50,000

February:

Output tax – Rs. 3,50,000, ITC – Rs. 1,70,000

March:

Output tax – Rs. 1,50,000, ITC – Rs. 4,50,000

M/s Cash Crunch Ltd. couldn't pay the tax for Jan, Feb and March but filed GSTR 1. GSTR 3B was not allowed to be uploaded by the portal

Department has issued a letter demanding interest @18% on the total output tax liability i.e.

Section 50(1) – Interest on delayed payment of tax...

Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder,

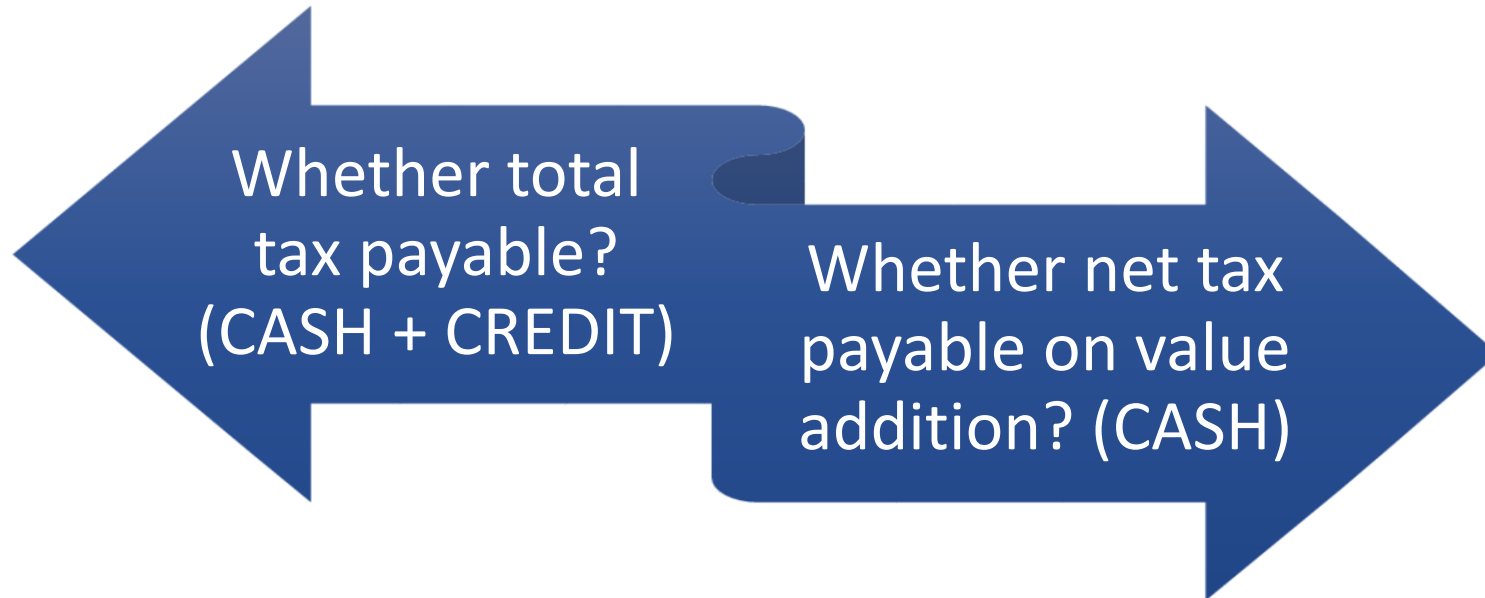
but fails to pay the tax or any part thereof to the Government within the period prescribed,

shall for the period for which the tax or any part thereof remains unpaid,

pay, on his own,

interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council

WHAT IS 'LIABLE TO PAY TAX'?



Need for amendment??

Section 50(1) – Interest on delayed payment of tax...



Failure in payment of tax

Interest not exceeding 18%

18% of.....??

Gross Tax Liability or Net Tax Liability?

Total output tax liability

**Total output tax liability
(–) Input Tax Credit
= Net Tax Liability**

INTEREST ON GROSS LIABILITY

MEGHA ENGINEERING AND INFRASTRUCTURES LTD

2019 (4) TMI 1319

Section 50(1) – PROVISO

Provided that the interest on tax payable

in respect of supplies made during a tax period

and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39,

except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period,

Not yet notified

shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger

GST – TAX ON VALUE ADDITION

GST law has been made on basis of recommendation of GST Council

31st Council meeting dated 22.12.2018

- The registered person effectively pays tax only on the value addition made by him. If this concept is applied for interest payable, then, it appears that the interest should also be charged on the tax payable on the value addition only, i.e. the amount of tax which is required to be paid through electronic cash ledger

GST COUNCIL

- 4. It is also pertinent to mention **that the liability of any registered person is related to the value addition** made by him since GST is leviable only on value addition. Accordingly, input tax credit is allowed to the registered person in respect of the tax paid by him on his inward supplies. And, while making the outward supplies, the input tax credit so allowed is permitted to be utilised for discharging his output tax liability. **The remaining part which is generally equivalent to the tax on value addition is discharged through electronic cash ledger.** Hence, by this mechanism the registered person **effectively pays tax only on the value addition made** by him. If this concept is applied for interest payable, then, it appears that the interest should also be charged on the tax payable on the **value addition only, i.e. the amount of tax which is required to be paid through electronic cash ledger.**

GST COUNCIL

- 5. Presently the interest is not calculated by the IT system. The registered person himself calculates the said interest and deposits the same. It appears, therefore, that any change would not pose any IT related challenge.
- 6. The issue was deliberated by the Law Committee in its meeting held on 15.12.2018. The Committee observed that **the proposal to charge interest only on the net liability of the taxpayer, after taking into account the admissible credit, may be accepted in principle. Accordingly, the interest would be charged on the delayed payment of the amount payable through the electronic cash ledger. However, where invoices/debit notes have been uploaded in Statements pertaining to the period subsequent to the period in which they should have been uploaded, the interest shall be calculated on the amount of tax calculated on the taxable value from the date on which the tax on such invoices was due. This would require amendment to the Law.**

PROVISO TO SECTION 50(1) – WHETHER RETROSPECTIVE?...

Refex Industries Ltd. Vs Assistant Commissioner of CGST & Central Excise (Madras High Court W.P.No.23360 of 2019) and (in W.P.No.23361 of 2019).

*15. The above proviso, as per which interest shall be levied only on that part of the tax which is paid in cash, has been inserted with effect from 01.08.2019, **but clearly seeks to correct an anomaly in the provision as it existed prior to such insertion. It should thus, in my view, be read as clarificatory and operative retrospectively***

...PROVISO TO SECTION 50(1) – WHETHER RETROSPECTIVE?

Allied Motors (P) Ltd vs Commissioner Of Income-Tax MANU/SC/0317/1997



A proviso which is inserted to remedy unintended consequences and to made the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, **requires to be treated as retrospective in operation** so that a reasonable interpretation can be given to the section as a whole

CREDIT AS GOOD AS TAX PAID

Eicher Motors Ltd. vs. Union of India 1999 (106) E.L.T. 3 (S.C.)

- *“Tax credit - Modvat credit - Provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessee concerned”.*

STAY ON INTEREST ON GROSS LIABILITY

Stay on coercive action against the Petitioner for non-payment of the interest amount

- *Landmark Lifestyle 2019 (5) TMI 1608 - Delhi HC*

Interest is compensatory

Pratibha Processors vs. Union of India 1996 (88) E.L.T. 12 (S.C.)

“...Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable.

The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty — which is penal in character.”

INTEREST CANNOT BE CHARGED DUE TO FAULT OF PORTAL

CASE LAW OF OCTAGON COMMUNICATIONS PVT LTD. VERSUS UNION OF INDIA (2019 (4) TMI 1246-GUJARAT HIGH COURT) provides:

- That the petitioner is allowed to file manual returns as there is no condition of pre-payment of tax for filing GSTR-3B.

RETURN Vs. VALID RETURN

Section 2 (117)

“Valid return” means a return furnished under sub-section (1) of section 39 on which self-assessed tax has been paid in full;

Section 2 (97)

“Return” means any return prescribed or otherwise required to be furnished by or under this Act or the rules made thereunder;

However, Section 39 provides only for ‘Returns’

INTEREST CANNOT BE CHARGED DUE TO FAULT OF PORTAL

Section 39(7)

- Every registered person who is required to furnish a return under subsection (1), other than the person referred to in the proviso thereto, or subsection (3) or sub-section (5), shall pay to the Government the tax due **as per such return** not later than the last date on which he is required to furnish such return:
- Provided that every registered person furnishing return under the proviso to sub-section (1) shall pay to the Government, **the tax due** taking into account inward and outward supplies of goods or services or both, **input tax credit availed, tax payable** and such other particulars during a month, in such form and manner, and within such time, as may be prescribed:
- Provided further that every registered person furnishing return under subsection (2) shall pay to the Government the tax due taking into account turnover in the State or Union territory, inward supplies of goods or services or both, tax payable, and such other particulars during a quarter, in such form and manner, and within such time, as may be prescribed.



WHETHER INTEREST AUTOMATIC?

DAEJUNG MOPARTS 2020 (2) TMI 668 - MADRAS HIGH COURT

- *Though the liability fastened on the assessee to pay interest is an automatic liability, quantification of such liability certainly needs an arithmetic exercise after considering the objections if any, raised by the assessee. It is to be noted that the term "automatic" does not mean or to be construed as excluding "the arithmetic exercise". In other words, though liability to pay interest arises under section 50 of the said Act, it does not mean that fixing the quantum of such liability can be unilateral, especially, when the assessee disputes the quantum as well as the period of liability. Therefore, though the liability of interest under section 50 is automatic, quantification of such liability shall have to be made by doing the arithmetic exercise, **after considering the objections of the assessee***

OPPORTUNITY OF BEING HEARD

Godavari Commodities Ltd [2019(12) TMI 275] Zharkhand HC

- *The petitioner shall be given an opportunity of being heard by the adjudicating authority, who shall give a hearing to the petitioner, whether the petitioner was liable to pay the short paid interest amount or not. In case, upon adjudication, it is found that the petitioner was not liable to make the payment of interest short paid, the said amount shall be refunded to the petitioner with statutory interest thereon.*

Two possible interpretations? Which to follow?

Where two views possible in a taxing statute, the interpretation which is beneficial to the Assessee should be adopted

Reliance can be placed on :

- G K Choksi & Co. v. CIT (2007) 165 taxman 299
- CTT v. S S Ayodhya Distillery (2009) 233 ELT 146

- SC G K Choksi & Co. v. CIT (2007) 165 taxman 299: ***“If two interpretations are possible, one in favour of the assess should be adopted”***
- SC CTT v. S S Ayodhya Distillery (2009) 233 ELT 146: ***“If there is ambiguity, benefit is to be given to the assessee”***

TIME LIMIT TO AVAIL ITC

SECTION 16(4)

TIME LIMIT TO AVAIL ITC

- Time limit for availing ITC as per 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”*

WHETHER GSTR 3B IS A RETURN?

As per Rule 61(5) of CGST Rules, 2017:

Original: W.E.F. 01.07.2017

“(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, return in FORM GSTR-3B, in lieu of FORM GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner

1st substitution: REMOVAL OF WORDS “IN LIEU OF FORM GSTR-3” W.E.F. 01.07.2017
(notification no. 17/2017 dated 27.07.2017)

“(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify that return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.”

AAP & CO VS. RETROSPECTIVE AMENDMENT

- **Hon'ble Gujarat High Court in the case of AAP & Company Chartered Accountants V/s Union of India** observed that
 - *“form GSTR-3 was supposed to be filed as a return. However, considering technical glitches in the GSTN portal it was decided to keep filing of GSTR-2 and GSTR-3 in abeyance. In order to ease the burden, it was decided to allow filing of a shorter return in Form GSTR-3B for initial period. The Court finally held that GSTR 3B was not introduced as a return in lieu of GSTR-3, therefore, GSTR 3B can not be termed as a return.”*
- **2nd substitution - Retrospective amendment in Rule 61 W.E.F. 01.07.2017 (notification no. 49/2019 dated 09.10.2019)**
 - *“(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 or in FORM GSTR-2 under section 38 has been extended, the return specified in sub-section (1) of section 39 shall, in such manner and subject to such conditions as the Commissioner may, by notification, specify, be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:
Provided that where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in FORM GSTR-3.*

Retrospective amendment to Rule Valid?

- Whether such amendment can be made snatching away ITC already availed?
 - Doctrine of promissory estoppel
 - **Motilal Padampat Sugar Mills Co. Ltd. MANU/SC/0336/1978** *“It is true that taxation is a sovereign or governmental function, but, for reasons which we have already discussed, no distinction can be made between the exercise of a sovereign or governmental function and a trading or business activity of the Government so far as the doctrine of promissory estoppel is concerned”*
 - (Also relied in the case of **Manuelsons Hotels Private Limited MANU/SC/0552/2016**)

Retrospective amendment power?

SECTION 166. Laying of rules, regulations and notifications.

- Every rule made by the Government, every regulation made by the Board and every notification issued **by the Government** under this Act,
- shall be laid, as soon as may be after it is made or issued, **before each House of Parliament**, while it is in session,
- for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid,
- both Houses agree in making any modification in the rule or regulation or in the notification, as the case may be, or both Houses agree that the rule or regulation or the notification should not be made,
- the rule or regulation or notification, as the case may be, shall thereafter **have effect** only in such modified form or be of no effect, as the case may be; so,
- **however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation or notification, as the case may be.**

RETROSPECTIVE AMENDMENT

Vatika Township Pvt Ltd. MANU/SC/0810/2014

- *Legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for the purpose of supplying an obvious omission in a former legislation or to explain a former legislation. Where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect.*

Retrospective amendment valid?

- Kanak Exports 326 ELT 26 (SC)
 - Interpretation of statutes - Delegated legislation - It can only be prospective unless rule making authority has been vested with power under statute to make rules with retrospective effect. [para 108]

Substantial right

- Hindalco Industries Ltd. 293 ELT 208 (All)
 - Word duplicate not mentioned in the invoice for MODVAT
- A.B. Card Clothing pvt ltd. 222 ELT 369 (P & H)
 - Declaration not filed in respect of capital goods for 2 years

RESTRICTIONS ON INPUT TAX CREDIT

RULE 86A

POWERS TO ISSUE RULE 86A

- No express provision in the Act to empower Government to issue such Rule as on date

Rule 86A...

86A. Conditions of use of amount available in electronic credit ledger.-

(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** in as much as

a) 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

ii. **without receipt** of goods or services or both; or

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**; or

...Rule 86A

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; or

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,

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.

(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that **conditions** for disallowing debit of electronic credit ledger as above, **no longer exist, allow such debit.**

(3) Such restriction shall **cease** to have effect **after the expiry of a period of one year** from the date of imposing such restriction.

CASE STUDY

- ITC of Mr. Late was blocked by the Department
- Therefore, Mr. Late could not furnish returns for last 12 tax periods as he was unable to pay tax due
- Now the restriction on ITC of Mr. Late has been removed
- However, the time limit to claim ITC has been expired
- What can Mr. Late do in such a situation?

QUANTUM OF ITC BLOCKAGE??

Can Department block entire ITC?

- *Rule 86A(1) “...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...”*

REASON TO BELIEVE

- It would be relevant to note that the expression 'reason to believe' in the context of income tax has been analysed time and again. It is well-settled law that the expression 'reason to believe' does not mean a purely subjective satisfaction on the part of departmental officer, the reasons for the belief must have a rational connection or relevant bearing to the formation of the belief
- ***[ITO v. Nawab Mir Barkat Ali Khan Bahadur (1974) 97 ITR 239 (SC)].***

INSTRUCTION TO BLOCK ITC

- CIRCULAR F. NO. 587/CE/167/POL/2019/11219-11269 DATED 13-1-2020
- *All the Zonal Chief Commissioners have the facility to block/unblock ITC availed in a situation covered under **Rule 86A(1)(a) of the CGST Rules, 2017** i.e. against fake invoices or against invoices without receipt of goods or services or both, if such availers of credit are located in their jurisdiction. To implement this provision, all the CGST Zones are required to make a list, GSTN-wise of fake credit availers and block their ITC under Rule 86A(1)(a) for the entities located in their jurisdiction. If, however, there are certain entities which are located outside their jurisdiction, they should forward a list of such availers along with GSTN No. to the local office of the Pr. ADG /ADG DGGI, with a request to block credit of such GSTN immediately.*

RESTRICTIONS ON INPUT TAX CREDIT

RULE 36(4)

ISSUE

Particulars	Feb'20	Mar'20	
		Situation 1	Situation 2
ITC as per books	10 lacs	15 lacs	15 lacs
ITC as per GSTR 2A	6 lacs	15 lacs	7.5 lacs
<u>ITC as per GSTR -2A</u>			
Feb'20		2.4 lacs	1.3 lacs

How much ITC can be availed in the return for the month of Feb'20?

Section 43A : Procedure for furnishing return and availing input tax credit

- 1) *Notwithstanding anything contained in sub-section (2) of section 16, section 37 or section 38, every registered person shall in the returns furnished under sub-section (1) of section 39 verify, validate, modify or delete the details of supplies furnished by the suppliers*
- 2) *Notwithstanding anything contained in section 41, section 42 or section 43, the procedure for availing of input tax credit by the recipient and verification thereof shall be such as may be prescribed*
- 3) *The procedure for furnishing the details of outward supplies by the supplier on the common portal, for the purposes of availing input tax credit by the recipient shall be such as may be prescribed*
- 4) ***The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescribed and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent. of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section***
- 5) *The amount of tax specified in the outward supplies for which the details have been furnished by the supplier under sub-section (3) shall be deemed to be the tax payable by him under the provisions of the Act*

....

Rule 36(4) of CGST Rules, 2017

Notification No. 49/2019-Central Tax, dated 09.10.2019 has inserted sub- rule (4) in Rule 36 of the CGST Rules,

The newly inserted sub-rule (4) reads as under –

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 percent 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

Legal Validity of Rule 36(4)...

Government through CGST Amendment Act, 2017 inserted Section 43A

For restriction the availment of ITC

However, section 43A has not been notified as on date

Clarification on ITC restrictions...

(Circular No 123/42/2019-GST dated 11.11.2019)

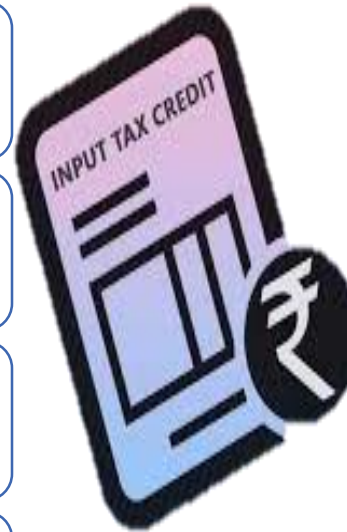
To be calculated on self-assessment basis (as the same would not be available on GST portal)

Applicable only on Invoice/Debit Note/s on which ITC is availed **after 09.10.2019**

ITC Restriction i.e. 10% of eligible credits to be calculated on the basis of GSTR-2A as **available on due date of GSTR-1**

10% rule **does not apply to** ITC in respect of IGST paid on **imports, RCM, credit received from ISD** etc.

Restriction is **not supplier wise but linked to eligible credit** from all suppliers



CUT OFF DATE FOR EXAMINING GSTR-2A

The cut-off date for determining ITC restriction i.e. 10% of eligible credits to be calculated on the basis of GSTR-2A available as on the due date of GSTR-1 (*As per Circular No 123/42/2019-GST dated 11.11.2019*)

Whether common portal updates immediately?

Whether recipient needs to burn midnight oil for tracking GSTR 2A as the details will be uploaded by the suppliers through out the due date?

Whether department has any mechanism to track GSTR-2A as on due date of GSTR-1?

...Clarification on 10% ITC restrictions...

(Circular No 123/42/2019-GST dated 11.11.2019)

Para 5 of the circular :

When can balance ITC be claimed in case avilment of ITC is restricted as per Rule 36(4)?

“Para 5. The balance ITC may be claimed by the taxpayer in any of the succeeding months provided details of requisite invoices are uploaded by the suppliers. He can claim proportionate ITC as and when details of some invoices are uploaded by the suppliers provided that credit on invoices, the details of which are not uploaded (under sub-section (1) of section 37) remains under 20 per cent of the eligible input tax credit, the details of which are uploaded by the suppliers. Full ITC of balance amount may be availed, in present illustration by “R”, in case total ITC pertaining to invoices the details of which have been uploaded reaches Rs. 8.3 lakhs (Rs 10 lakhs /1.20). In other words, taxpayer may avail full ITC in respect of a tax period, as and when the invoices are uploaded by the suppliers to the extent Eligible ITC/ 1.2”

SOLUTION

	Feb'20	Mar'20	
		Situation 1	Situation 2
ITC as per books	10 lacs	15 lacs	15 lacs
ITC as per GSTR 2A	6 lacs	15 lacs	7.5 lacs
<u>ITC as per GSTR -2A</u>			
Feb'20		2.4 lacs	1.3 lacs
ITC that can be availed in GSTR 3B	(6 + 0.6) lacs	(15 + 2.64*) lacs	(7.5 + 0.75 + 1.56**) lacs

***Situation 1 :** In this case, ITC taken in GSTR 3B of Feb'20 is Rs. 6.6 lacs i.e. (6 +10% Of 6). The ITC corresponding to Feb'20 and taken in Mar'20 is Rs. 2.64 lacs i.e. (2.4 +10% of 2.4)

**** Situation 2 :** The ITC taken in the month of November in regards to October is Rs 1.43 lacs i.e. (1.3 +10% of 1.3).



Thanks



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