

Reversal of Input Tax related to Unsold Inventory on the Date of Completion Certificate or First Occupation

Article 366(26A). Meaning of Service

²[(26A) "Services" means anything other than goods;

Inserted by the Constitution (One Hundred and First Amendment) Act, 2016, w.e.f. 16.9.2016

CGST Act, 2017- Meaning of Service

Section 2(102) of CGST Act, 2017 "services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

⁸[Explanation.—For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;]

Comments:

As the Immovable Property has not been excluded from the definition of Service, hence the sale of Immovable Property is Service though outside the scope of Supply by virtue of Schedule-III of Section 7 of CGST Act, 2017

Construction of Complex Building is Supply of Service

Para 5(b) of Schedule-II of CGST Act, 2017- Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier- ***shall be treated as Supply of Service***

Input Tax Credit

Section 16(1) starts with "Subject to" that "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 "

Gujarat Narmada Valley Fertilizers Co Ltd Versus Union Of India [2016 (342) E.L.T. 500 (Guj.)]- Legislature, therefore, makes a provision "subject to" another provision, the former would yield to the latter and in other words, in case of a conflict, the provisions of the latter would prevail.

South India Corporation (P) Ltd. v. Secretary, Board of Revenue Trivandrum and Another reported in AIR 1996 Supreme Court 207, the Constitution Bench of the Supreme Court observed that the expression “subject to” conveys the idea of a provision yielding place to another provision to which it is made subject.

Comments:

In view of the above, the registered person shall be entitled to credit of the input tax only when

- a. There is no restriction to take the credit in other provisions of the act, rules
- b. The conditions for availing the credit has been satisfied.

Restricted Credit of Input Tax is as per Section 17 of CGST Act, 2017

Conditions for the Credit of the Input Tax is as per Section 16(2), 16(3) and 16(4) of the CGST Act, 2017

Hence once the conditions of the credit of the input tax has been fulfilled and the credit of the input tax is not restricted, the assessee becomes the absolute owner of the of such credit of input tax.

Restriction on availment of Credit of Input Tax

Legal Provisions

Section 17(2) of CGST Act, 2017- 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.

Section 17(3) of CGST Act, 2017- The value of exempt supply under section 17(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.

Comments:

Definition of Exempted Supply has been enlarged only for the limited purpose for the reversal of credit of input tax and includes within its ambit

- a. supplies on which the recipient is liable to pay tax on reverse charge basis
- b. transactions in securities
- c. sale of land and
- d. subject to clause (b) of paragraph 5 of Schedule II, sale of building

Hence the credit of the input tax if utilized towards the sale of land or sale of building after completion shall be restricted.

Further the credit of the input tax shall be allowed in respect to sale of building for which neither the completion certificate has been obtained or the first occupation has been allowed.

Goods or Services becoming Exempted Supply Section 18(4)-

Legal Provisions

Section 18(4) of CGST Act, 2017- Where any registered person who has availed of input tax credit opts to pay tax under section 10 or, where the goods or services or both supplied by him become wholly exempt, he shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods, reduced by such percentage points as may be prescribed, on the day immediately preceding the date of exercising of such option or, as the case may be, the date of such exemption

Section 2(47) of CGST Act 2017- “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;

Comments:

Construction of Building after the completion certificate or first occupation, does not become the exempt supply. Sale of Building after completion certificate has not been exempted and same is not contained in list of the services in the Notification No-12/2017- Central Tax dated 28.06.2017.

In view of the above analysis no reversal of credit of the input tax is required to be made for the input tax availed on the goods or services used when the building was under construction and subsequent to issue of completion certificate ceases to fall within the ambit of supply by virtue of Schedule-III of Section 7 of CGST Act, 2017.

Eligibility of the Credit of Input Tax at the time of Availment not at time of Utilization

CESTAT Principal Bench, New Delhi in case of Ruchi Malls Pvt Ltd vs C.S.T, Delhi- II [2020 (34) G.S.T.L 426]- The appellant availed Cenvat credit in respect of service tax paid on various input services used in the construction of such Mall. **Appellant Contention-** Credit was availed by the appellant prior to the period March’ 2011 and the Mall was also completed on 05.03.2011. It was further argued that credit on the disputed services was taken by the appellant under the un-amended definition of input service (effective up to 31.3.2011), such services should be considered as input service and the Cenvat credit should be available to the appellant. **Order:** The appellant contended that the Cenvat credit was availed prior to 01.04.2011. In such eventuality, taking of credit is in conformity with the Cenvat statute. Since taking of Cenvat credit is proper and justified, its utilisation

after 01.04.2011 cannot be questioned or disputed by the Department, in view of the fact that taking of Cenvat credit decides its utilisation, according to the convenience of the assessee.

Eligibility and Restriction to be checked at the time of Receipt of Goods/ Service

Gujarat High Court In Case of Principal Commissioner Versus M/s Alembic Ltd

Harmonious reading of Rule 3 of the Rules read with Rules 6 and 11(4) of the Rules held that eligibility/entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard.-

As at the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6.

Whether Reversal of Input Tax is to be done on Pro-Rata basis for Unsold Units

Gujarat High Court In Case of Principal Commissioner Versus M/s Alembic Ltd

Cenvat credit availed in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future.

The Tribunal therefore, rightly held that once the respondent are not required to reverse any credit availed by them on valid input services availed during the period 2010 till obtaining of completion certificate, the said amounts reversed by them under protest cannot be retained by the revenue authorities and have to be refunded to the respondent

Gujarat High Court in case of Principal Commissioner vs Shreno Ltd has allowed the Cenvat Credit on Input Services on the unsold inventory lying after issue of Completion Certificate. Cenvat Credit was availed before the issue of Completion Certificate. [2020 (34) G.S.T.L 416]

However Supreme Court has issued Notice in the SLP against the above Judgement. [2020 (34) G.S.T.L J82]

In an Application filed before AAR under GST by PPD Living Spaces Pvt Ltd [2018 (18) G.S.T.L. 95 (A.A.R. - GST)]- Completion Certificate in respect of the project has been

issued on 31-5-2018 and the proposed transaction is in respect of sale of developed plots/land with civil structures after the issuance of Completion Certificate. Therefore the transaction is covered by Paragraph 5 of Schedule III of the GST Act. Hence the sale deed executed for plot as well as undivided share in common area attracts only stamp duty and registration charge. The Input Tax Credit availed in respect of the GST paid on goods and/or services used/consumed for the development of the land is liable to be reversed on pro rata basis in respect of the plots sold after the issuance of completion certificate.

Input Tax Credit is the Right of the Assessee once availed subject to Conditions and Restrictions

Supreme Court in the case of Eicher Motors Ltd. v. Union of India, 1999 (106) E.L.T. 3 (S.C.), for the proposition that a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility thereto gets worked out or until those goods existed.

Supreme Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd., 1999 (112) E.L.T. 353 (S.C.), wherein it is held that when credit has been validly taken, its benefit is available to the manufacturer without any limitation in time. The credit is indefeasible.

Hon'ble High Court of Gujarat in matter of Shabnam Petrofiles Pvt Ltd vs Union of India. High Court has held that Section 54(3)(ii) of Central Goods and Services Tax Act, 2017 not empowers the respondents - Central Government to frame rule providing for lapsing of the input tax credit - Accordingly, Notification No. 20/2018-C.T. (Rate), dated 26-7-2018 and C.B.I. & C. Circular No. 56/30/2018-GST, dated 24-8-2018 to the extent it provides that the input tax credit lying unutilized in balance, after payment of tax for and up to 31-7-2018, on the inward supplies received up to 31-7-2018, shall lapse, are hereby quashed and declared as ultra vires

Input Tax Credit is the Right of the Assessee once availed subject to Conditions and Restrictions and assessee becomes the absolute owner. It become the property of the assessee.

Conclusion:

- 1. If the credit of the Input Tax has been availed during the construction of building, no reversal of credit of input tax is required to be made in relations to the unsold units lying on the date of the issue of Completion Certificate**
- 2. Assessee is required to reverse the credit of the input tax on the goods or services availed after the issue of the completion certificate as per Section 17(2) read with Rule 42, 43, 44 of CGST Rules, 2017**

Above Analysis is based on Personal Understanding of the Author

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