

A CRITICAL ANALYSIS OF UNJUSTIFIED PROVISIONS OF ITC UNDER GST LAW

By

Adv. Deepak Bapat

dkbapat2002@yahoo.co.in

9820528006

VAT v/s GST

Maharashtra VAT Act Section 48(1): The State Government may, by rules, provide that ----- a set-off or refund of the whole or any part of the tax paid on purchases -----, **be granted to the dealer.**

Maharashtra VAT Rule 52: In assessing the amount of tax payable in respect of any period, **the Commissioner shall ---- grant a set-off.**

Under GST there is no obligation on the Commissioner to grant ITC unless claimed/availed by a taxable person.

SECTION 16(1)

- ❖ Every registered person shall subject to such conditions and restrictions as may be prescribed,
- ❖ in the manner specified in Section 49,
- ❖ be entitled to take credit of **input tax charged on any supply** -----
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.

INPUT SHALL BE A PART OF OUTPUT FOR AVAILING ITC?

- ❖ As per Section 2(59) “input” means any goods other than capital goods **used or intended to be used** by a supplier **in the course or furtherance of business**.
- ❖ As per Section 2(60) “input service” means any service **used or intended to be used** by a supplier **in the course or furtherance of business**.
- ❖ Thus, input may not be a part of output. Only condition is that, it is used or intended to be used for business. Therefore ITC on Stationary, Office equipment etc. and even on Capital Assets is being granted.

❖ **In case of VKC FOOTSTEPS INDIA PVT. LTD.[Special Civil Application No.2792 of 2019 dated 24/07/2020 Gujarat HC]** it is held *“the Net ITC should mean “input tax credit” availed on “inputs” and input services” as defined under the Act.”* Relevant Paragraphs are reproduced below for ready reference.

❖ **Para 26.** In view of the above, Explanation (a) to the Rule 89(5) is read down to the extent that Explanation (a) which defines “Net Input Tax Credit’ means “input tax credit” only. The said explanation (a) of Rule 89(5) of the CGST Rules is held to be contrary to the provisions of Section 54(3) of the CGST Act. **In fact the Net ITC should mean “input tax credit” availed on “inputs” and input services” as defined under the Act.**

- ❖ Para 27. The respondents are therefore, directed to allow the claim of the refund made by the petitioners considering the unutilised input tax credit of “input services” as part of the “net input tax credit”(Net ITC) for the purpose of calculation of the refund of the claim as per Rule 89(5) of the CGST Rules,2017 for claiming refund under Sub-section 3 of Section 54 CGST Act,2017.
- ❖ Even after citing this judgment, the Proper Officer at Mumbai in my case, proposed vide email, to reject the refund claim pertaining to tax paid on services stating “that there is no Notification issued from the department till date, related to the Gujarat HC judgment and whether we require Personal Hearing for the same.”

- ❖ Moreover, the Officer, over telephone requested my client to agree with the said rejection.
- ❖ In reply, we submitted that “we are not in agreement with your decision of rejecting the refund of Rs.12820/- . However we do not require Personal Hearing and request you to grant the refund by deducting the aforesaid amount from the amount claimed by us. After we receive the refund of the amount which is appropriate according to you, we may exercise our statutory right of filing appeal against the order of said reduction.”

CREDIT TO ITC LEDGER

- ❖ By filing Form TRAN-1 & Form 3B
- ❖ Section 41. Claim of ITC and provisional acceptance thereof:
 - ❖ (1) Every registered person shall ---be entitled to take credit of eligible ITC, as **self-assessed**, **in his return**, and such amount **shall be credited** on a **provisional basis** to his electronic credit ledger.
 - ❖ (2) Said credit shall be utilized only for payment of self-assessed output tax as per return.

RESTRUCTURING OF FORM 3B & ITC LEDGER IS NEEDED

- ❖ Reason:- Only eligible ITC claimed in 3B gets credited in ITC ledger. Ineligible ITC cannot be shown in 3B in the month of purchase. If such ineligible ITC becomes eligible after the time prescribed u/s 16(4) gets over, it will lapse.
- ❖ Reason:- In previous year's 3B, ITC not claimed in view of Rule 36(4). Hence it is not credited to ITC ledger. That amount reflected in GSTR-2A after 20th October of subsequent year i.e after the date prescribed u/s 16(4) for filing return of September of subsequent year. Said ITC cannot be claimed in any return filed after the aforesaid date.

- Reason: Tax payer did not claim ITC on some Input & capital goods, because of wrong impression, that it is covered u/s 17(5). In some other case, ineligible input used for exempted sale was computed as per RATIO of exempted and taxable sales. After filing 3B, he found, if the input used for exempted sale is actually identified, eligible ITC will be more than claimed. **As 3B cannot be revised, it is lost permanently, being not claimed or claimed less.**
- If such additional claim is shown in current 3B return, it would be against the provision of Section 16(4).

- If revision of 3B is not allowed, only alternative is WRIT PETITION on the ground:
- As there is no mechanism for revision/rectification of 3B and as GSTR-2 is not activated to show every inward transaction of tax paid, following direction by High Court is necessary.
- The Government shall modify ITC Ledger and Form 3B to facilitate, showing of the entire amount of input tax paid (whether eligible or not). It shall also facilitate [irrespective of Section 16(4)] showing ITC pertaining to earlier tax period which now became entitled for any reason and

- All the aforesaid tax paid shall be credited to ITC ledger, from which a taxable person shall be allowed to use eligible amount of ITC for payment of output tax as per 3B and
- For payment of any tax payable, as per any return due thereafter or as per demand raised in any proceeding.

SECTION 16(2):

ITC is subject to following conditions.

(a) Possession of Tax Invoice or debit Note etc.

(b) Goods or services are actually received.

(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 utilisation of ITC admissible in respect of the said supply.

To prohibit such claim, there is cross check mechanism under various Sections.

SECTION 43A

- ❖ Section 43A provides the procedure for furnishing return and availing input tax credit. **This Section is kept in abeyance till new returns are introduced.**
- ❖ **Sub-section (1) provides that** “Notwithstanding anything contained in Section 16(2), 37 or 38, every registered person shall, in the returns furnished under Section 39(1), verify, validate, modify or delete the details of supplies furnished by the suppliers.”

❖ **Sub-section (4) provides that** “The procedure for availing ITC 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 ITC which can be so availed, **not exceeding twenty per cent of the ITC**, on the basis of details furnished by the suppliers under said sub-section.

❖ **In view of the above, Rule 36(4) has been prescribed.**

RULE 36

- ❖ **Rule 36(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 uploaded by the supplier under sub-section (1) of Section 37, shall not exceed **ten percent** of the eligible credit available in respect of invoices or debit notes, the details of which have been uploaded by the supplier under section 37(1).”*
- ❖ With effect from 09.10.2019.
- ❖ Initially, additional ITC was allowed @ 20%, over matched amount.
- ❖ Which was reduced to 10%; and
- ❖ **Till Corona goes back to China, ITC to be taken as per books of accounts, subject to below mentioned Notification.**

- Vide notification No.30/2020-Central Tax, dated 03.04.2020, a proviso has been inserted in CGST Rules 2017 to provide that the said condition shall not apply to ITC availed in **3B** for February to August, 2020, but
- It shall apply cumulatively for the said period and **3B** for September, 2020 shall be furnished with cumulative adjustment of ITC for the said months as per Rule 36(4).

UN-MATCHED ITC TO BE FORGOTTEN FOREVER?

❖ **Morarji Paper Products (Bombay High Court Judgment dated 05/08/2014 in Sales Tax Reference Application No.4 of 2002 in Reference Application No.67 of 1997):-** The Court rejected the Sales Tax Reference application of the Department contending that the Tribunal has wrongly granted the set-off without considering that Section 42(3) as it stood then as well as it stands today declares that the amount of draw-back, set-off or refund shall not exceed the amount of tax in respect of the same goods paid, if any, into Government Treasury and therefore the order passed by the Tribunal needs to be set aside, particularly, **when there was no dispute that the amount of tax was not paid into Government Treasury by the supplier.**

❖ **In Para 9 of the said judgment, Court observed “However, we clarify that we have not examined any wider question or controversy particularly with regard to the applicability of Section 42(3) of the BST Act, as it then stood and as it stands now. In an appropriate case, this Court may decide as to whether there is a difference in the language of the un-amended and amended provisions and secondly whether the mandate of the Section is that the amount of refund shall not exceed the tax in respect of the same goods paid into the Government Treasury. Can this provision be applied to set-off or restricted in its application to draw-back or refund alone. We are keeping open this controversy for being decided in an appropriate case.”**

- ❖ In fact, the words “actually paid” used in [Section 16\(2\)\(c\)](#) should be read as “actually not paid”, because unless it is established that the ‘output tax’ on the corresponding outward supply is “actually not paid” by the supplier, ITC cannot be denied to the recipient.
- ❖ Onus is on Proper Officer to establish, that tax is actually not paid by the supplier.
- ❖ Proper Officer cannot instruct the recipient to prove payment thereof.

- ❖ How to ascertain the payment of tax by supplier in cash or through ITC?
- ❖ Fortunately, under GST Act, payment of tax by the supplier in cash or through ITC, is not literally taken by the authorities.
- ❖ Therefore uploading of GSTR-1 by suppliers is being taken as tax actually paid.
- ❖ Otherwise, in a case where supplier's ITC is disallowed u/s 16(2)(c) of CGST Act, would have made recipient's life miserable in establishing his ITC as well as of all suppliers in the chain.

❖ Notice for mismatch ITC in 3B & 2A:

- ❖ As the onus to prove non-payment of tax on each outward supply is on proper officer, said notices are invalid being on summary basis.
- ❖ As GSTR-2 is not activated, the Officer cannot pass the transaction wise order disallowing ITC.
- ❖ At the most he can select the case for scrutiny of all input transactions and direct the recipient to furnish details of all input transactions and thereafter

- ❖ he shall match it with GSTR-1 of all suppliers for passing order to disallow such ITC.
- ❖ **So it is advisable to ask details of each transaction on which suppliers have failed to pay tax.**
- ❖ **S.P. & Co. and another, Vat Appeal No. 3 & 4 of 2009 decided on 06/04/2009 Maharashtra VAT Tribunal:-** It was held “it may be that second allegation regarding vendor not having paid tax can be proved by the Revenue with the help of relevant record relating to these vendors but, in that case, it is to be noted that the facts in that regard have to be clearly brought on record transaction wise. That means the Revenue will have to prove that on very goods purchased by the Appellant, the concerned vendor has not paid tax.

- ❖ In that view of the matter, if a particular vendor has been selling his goods to various parties including the present Appellant and if the vendor has made partial payment, then in that case merely on the basis of return and tax payment, the allegation qua particular purchase cannot be proved unless the transaction wise verification is made.
- ❖ However, in that regard, nothing has been brought before us to show that the department has done any investigation in the matter and whether it is correlated to particular purchases of the Appellant that the corresponding sales of vendors on which non-tax payment is alleged. As the allegation of supplier's failure to pay tax is not established transaction wise, the said recovery of sales tax from the Petitioner is bad in law."

❖ Procedure for disallowance is vague and endless:

- ❖ Allowing to include transactions not contained in the tax period for which 3B or GSTR-1 is being filed, have resulted in no finality.
- ❖ ITC disallowance shall be transaction wise, because, in GSTR-1, all invoices and debit notes shall be shown by the supplier.
- ❖ Matching shall be done for each tax period or after filing Annual Return/Audit Report.
- ❖ There is no provision to initiate comprehensive assessment for the entire year.
- ❖ Therefore there is no finality at the end of any particular year qua all tax periods included in it.

BOOKS OF RECIPIENT ARE SUPREME

Issues:

- ❖ Two GSTN were granted to one taxable person by Excise Department & VAT Department.
- ❖ In sales invoices issued during first few periods, GSTN given by Excise Department was shown; and thereafter invoices were issued by mentioning GSTN given by VAT Department.
- ❖ Similarly GSTR-3B and GSTR-1 for first few periods were filed under GSTN given by Excise Department and thereafter under GSTN given by VAT Department.
- ❖ **As a result, recipient is facing the problem of mismatch.**

❖ Reasons for Non-filing of GSTR-1 by suppliers:

- (a) where GSTN Portal failed to migrate them into GST.
- (b) Technical Glitch at GST Portal on 20th October (31st March 2019) which was last date to upload GSTR-1.
- (c) Personal difficulties of Dealer like death of nearby person in \ family, critical and constant illness etc.
- (d) Financial Crunch and general slowdown in business of dealer.

- ❖ Invoking Section 16(2)(c) without invoking following sections against supplier is justified?
- ❖ Section 62: Assessment of non-filers of returns.
- ❖ Section 76: Tax collected but not paid to Government
- ❖ The recipient should write to his proper officer as well as to supplier's proper officer, to take action against non-payer.
- ❖ I have filed a Writ Petition to Bombay High Court asking to take suitable action against proper officers for such failure and direct them to act before supplier's assessment becomes time barred.

- ❖ This will be helpful to quash the action of disallowance of ITC because of failure of both the proper officers to take appropriate action.
- ❖ Appointment of Commissioner is to carry out all the purposes of the Act.
- ❖ If he invokes all Sections against recipient but failed to invoke charging Section 9(1) against defaulting supplier, the case is arguable for setting aside the action of recovery from recipient. It can be submitted that the said amount of ITC cannot be denied and the amount of tax to that extent cannot be recovered from recipient, as the said liability arose because of failure of the Principal Commissioner and his subordinate officers to recover the said tax from the selling defaulting vendors. **In such case the said loss of revenue should be borne by the Government.**

- ❖ **Section 9(1):** Subject to provisions of sub-section (2), there shall be levied a tax called CGST on all intra state supplies of goods or services or both, ----- on the value determined under Section 15 and at such rates, not exceeding 20% as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.
- ❖ **Section 3:** The Government shall, by notification appoint the following classes of officers for the purposes of this Act, namely -- -----.
- ❖ **Section 5 -Powers of officers:** Subject to such conditions and limitations as the board may impose, an officer of Central Tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

SECTION 16(2)(D)

- ❖ Clause (d) provides that ITC cannot be availed unless the return u/s 39 is furnished.
- ❖ **Means no recognition for Annual return u/s 44. In fact** After the mistakes in ITC are rectified in Return for September of subsequent period, there is one more chance to rectify such mistakes, in Annual return to be filed on or before 31st December of subsequent period or on the extended date.

- ❖ Whether ITC self determined as per Annual Return becomes permanent?
- ❖ Returns not furnished and Investigation commenced. ITC cannot be allowed by Investigation Officer. This denial may be as per law. But the question is, whether such law is justified? **Also see Section 16(4).**

PROVISO TO SECTION 16(2)

- ❖ First Proviso: 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:
- ❖ Second Proviso: Where a recipient fails to pay the purchase price and tax to supplier (other than supplies liable to RCM) within six months from the date of invoice, the ITC availed shall be added to his output tax liability.
- ❖ Third Proviso: After the aforesaid amount is paid to supplier, recipient shall be entitled to avail the credit of said ITC. (See Rule 37)

SECTION 16(4):

- ❖ No ITC of any Invoice, if the return is filed after the date prescribed u/s 39; for filing return of September of subsequent year or for filing Annual return of current year whichever is earlier i.e. 20th October of subsequent year. **This condition is also not rational.**
- ❖ This is deviation from VAT Act under which ITC was being granted at the time of assessment, even where it was not claimed in return filed, or even where no returns were filed. **The view taken by the Tribunal/Courts in number of cases is that every return filed before assessment shall be taken into account by the assessing officer.**

- ❖ **Notice to reverse ITC:** These are being sent by Senior Intelligence Officer, Directorate General of GST Intelligence of respective Area or by Proper Officer.
- ❖ Suppose any return of 2018-19 is filed after 20th October 2019 by claiming ITC, Proper Officer will come to know by common sense, that Section 16(4) applies.
- ❖ But if ITC transaction of 2018-19 is included in any return of subsequent year filed after 20th October 2019, authorities cannot pass the order for reversal of ITC, without investigating book of accounts.

- ❖ **Option with Tax Payer:** To reverse and pay the ITC with interest OR reply as follows.
- ❖ **Submissions:** Said return was not filed for financial crunch- GST Portal not allows return filing without payment. Tax paid on input is a 'prepaid tax'.
- ❖ In Collector of Excise v. Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.) it was held "credit under MODVAT scheme is as good as the tax paid. "
- ❖ Therefore credit thereof is being allowed for payment of output tax. There is no difference between 'tax paid in cash' and 'prepaid tax'. So distinction cannot be made between both these taxes paid.

- ❖ ITC is available if used or intended to be used in business. So entitlement can be after 20th October also. Hence the credit to ITC Ledger should be allowed even where the transactions falls u/s 17(5). So the tax payer can use such credit (if legally entitled) at his option to pay 'output tax' payable as per any return due thereafter or if such liability occurs in any proceeding.
- ❖ *We are not going to be benefited by late filing of returns.*
- ❖ Late filing gets regularised after payment of late fee. Please refer the recent concession in late fee provided for any return from July 2017 onwards.
- ❖ Therefore, there is no rational, in invoking Section 16(4).

- ❖ It is against the principle *Lex Non Cogit Ad Impossibilia*. Means, the Law does not compel a man to do certain act, which he cannot possibly perform. Therefore, **this restriction on ITC is unreasonable.**
- ❖ Though, Article 19(1)(g) allows restrictions in tax matters, for timely recovery of taxes, it **cannot be without establishing the interest of general public.**
- ❖ Government claims that for a welfare State, collection of taxes is an important aspect in the governance of a country and therefore, the State is required to see that tax is realised, so that such tax can be utilised in the welfare activities of the State. **If the payment of tax is evaded the State Government will not be able to carry out its activities and thereby the developmental works of the State is halted. In order to realise tax effectively, the State may pass orders imposing obligation on any person carrying on business and such restriction cannot be said to be unreasonable.**

- ❖ The Government argues that such restriction is to reduce, evasion of tax by delaying the returns or by not filing the returns.
- ❖ Our submission is that, there are other penal provisions to enforce the payment of tax by filing the returns, such as, cancellation of registration certificate, passing of assessment order u/s 62(1) levying any tax to the best of judgment of the assessing officer, levy of interest, penalty, prosecution etc.

❖ Moreover, ITC is a tax which is already paid and therefore if return is not filed within the time specified u/s 16(4), there is no evasion of any tax. On the contrary, because of such denial of ITC, a possibility of not filing such return is very high. As such taxpayer will be liable to pay entire amount of output tax, he may think of evading the payment of output tax. In many cases, the amount of ITC is more than output tax payable. Therefore it cannot be presumed that the intention behind non filing of return was to evade the payment of tax. Therefore denying the ITC by invoking Section 16(4) means one more penal action for the same default. In view of the above it cannot be said that this restriction is reasonable and in the interest of general public.

- ❖ Under the circumstance and legal position, we request you to withdraw the said notice.
- ❖ In Nelco Ltd., Bombay High Court upheld the provision of this time limit; but in that case Section 16(4) was not specifically challenged. That case was for challenging the time limit provided for filing TRAN-1.
- ❖ Therefore in a fit case, challenge should continue.

RULE 86A.

- ❖ **Rule 86A: Conditions of use of amount available in electronic credit ledger.** This has been inserted vide Notification No.75/2019-Central Tax, New Delhi 26.12.2019.
- ❖ (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

(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.”.

- ❖ **Rule 42(2):** The input tax credit determined under sub-rule (1) shall be calculated finally for the financial year before the due date for furnishing of the return for the month of September following the end of the financial year to which such credit relates, in the manner specified in the said sub-rule and-
- ❖ (a) where the aggregate of the amounts calculated finally in respect of D1' and D2' exceeds the aggregate of the amounts determined under sub-rule (1) in respect of D1' and D2', such excess shall be added to the output tax liability of the registered person in the month not later than the month of September following the end of the financial year to which such credit relates and

- ❖ the said person shall be liable to pay interest on the said excess amount at the rate specified in sub-section (1) of section 50, for the period starting from the first day of April of the succeeding financial year till the date of payment; or
- ❖ (b) where the aggregate of the amounts determined under sub-rule (1) in respect of D1 and D2 exceeds the aggregate of the amounts calculated finally in respect of D1 and D2, such excess amount shall be claimed as credit by the registered person in his return for a month not later than the month of September following the end of the financial year to which such credit relates.

SECTION 42 – MATCHING, REVERSAL AND RECLAIM OF ITC:

- ❖ (1) The details of every inward supply, furnished by recipient, for a tax period, shall be matched, with the corresponding details of outward supply furnished by the corresponding supplier, in his valid return, for the same tax period or any preceding tax period.
- ❖ (2) The claim of ITC matched with details of corresponding outward supply, shall be communicated to recipient.
- ❖ (3) Where the ITC is in excess of tax declared by the supplier for the same supply, or the outward supply is not declared by the supplier in his valid returns, the discrepancy shall be communicated, **to both** such persons.

- ❖(4) Duplication of claims of ITC, shall be communicated to the recipient, in such manner as may be prescribed.
- ❖(5) The amount which is not rectified by the supplier, in his valid return for the month in which discrepancy is communicated, shall be added to the output tax liability of the recipient, in his return for the succeeding month in which the discrepancy is communicated.

- ❖(6) If duplication of ITC claimed is found, it shall be added to output tax liability of the recipient, in his return for the month in which duplication is communicated.
- ❖(7) The recipient shall be eligible to reduce, from his output tax liability, the amount added under sub-section (5), if the supplier declares the details of the invoice or debit note in his valid return, within the time specified in sub-section (9) of Section 39.

THANK YOU

Adv. Deepak Bapat /Email:- dkbapat2002@yahoo.co.in /Mob:- 9820528006