

Handling emerging issues in Input Tax Credit

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**Departmental notices for difference between
GSTR-2A and GSTR-3B – Whether reversal of
ITC required ?**



1 01.07.2017 till 08.10.2019

2 09.10.2019 till Budget 2021 amendment effective

3 Post Budget 2021 amendment effective



1. B2B supplies not reported in GSTR 1 by mistake.
2. B2B supplies reported as B2C by mistake
3. B2B supplies reported with wrong GSTIN by mistake
4. Invoice in name of transferor



Vendor has
filed GSTR 3B

GSTR 3B has
not been filed

This view may be taken in scenarios where the supplier has paid tax in GSTR-3B but omitted to report tax invoice in GSTR-1



Mangalore Chemicals & Fertilizers Ltd., 1991 (55) ELT 437 (S.C.)

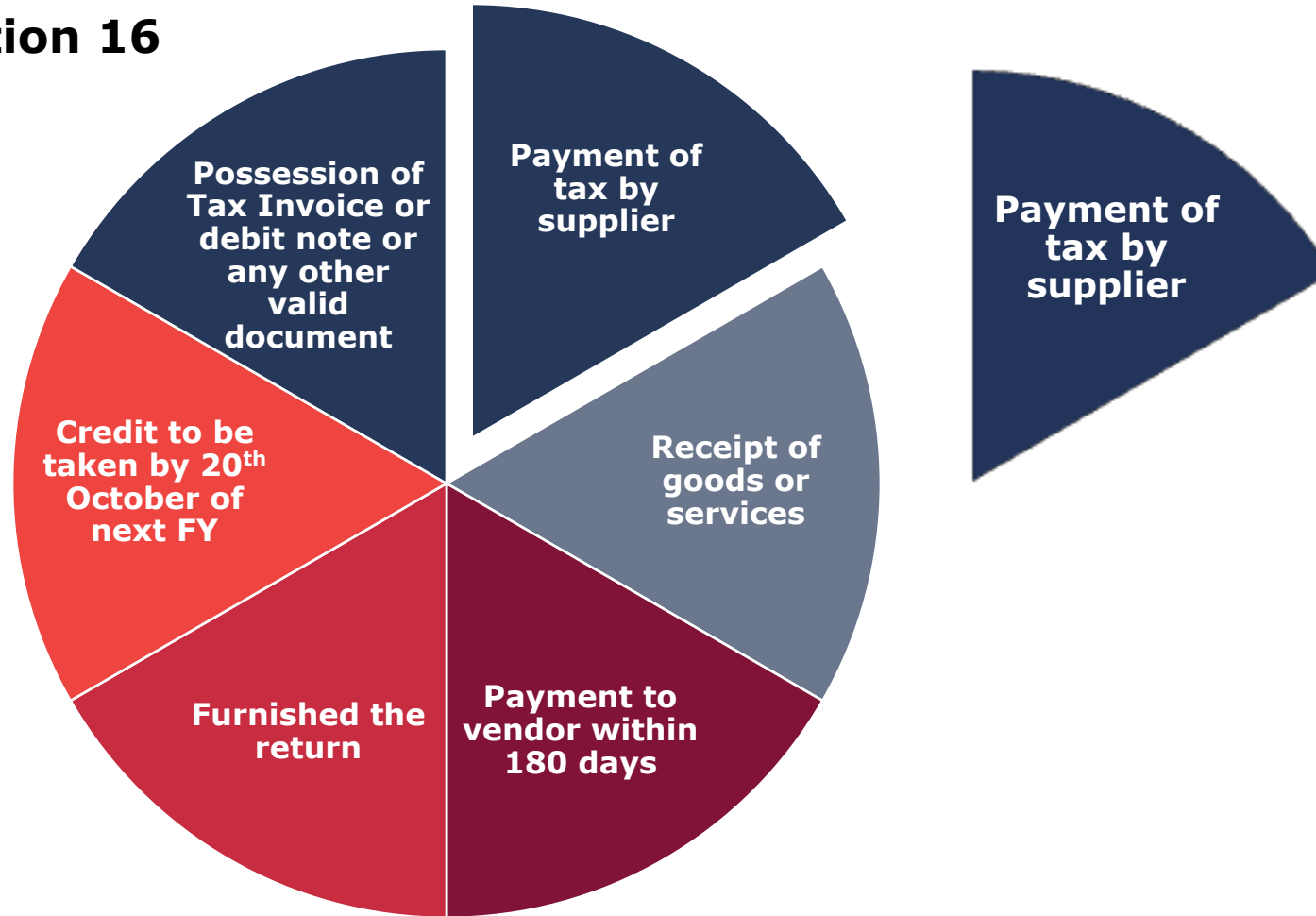
The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve.



Hospira Health Care India P. Ltd. 2016 (340) ELT 668 (Madras)

It held that a procedure should not run contrary to the substantive right in the policy. If the procedural norms are in conflict with the policy, then the policy will prevail and the procedural norms to the extent they are in conflict with the policy, are liable to be held bad in law

Section 16



Section 16(2)(c)

- subject to the **provisions of section 41 / 43A**,
- the **tax** charged in respect of such supply
- has been actually **paid** to the Government,
- either in **cash** or through utilization of **input tax credit** admissible in respect of the said supply

Section 41

Every registered person to **provisionally** take the credit of eligible input tax, as **self-assessed**, in his return which shall be credited in his electronic credit ledger.

Section 42(3) – Matching, reversal and reclaim of ITC

The provisions related to **matching, reversal and reclaim of Input Tax credit**. Section 42(3) of the CGST Act states that where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the 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 in such manner as may be prescribed.**

Section 42(5)

The amount in respect of which any discrepancy is communicated under sub-section (3) and 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 such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.**

Is Reconciliation legally required?

Rule 69 – Matching of ITC

Prescribes **details** relating to the claim of input tax credit on inward supplies including imports, provisionally allowed under section 41, **shall be matched** under section 42 after the due date for furnishing the return in FORM GSTR-3.

Rule 71

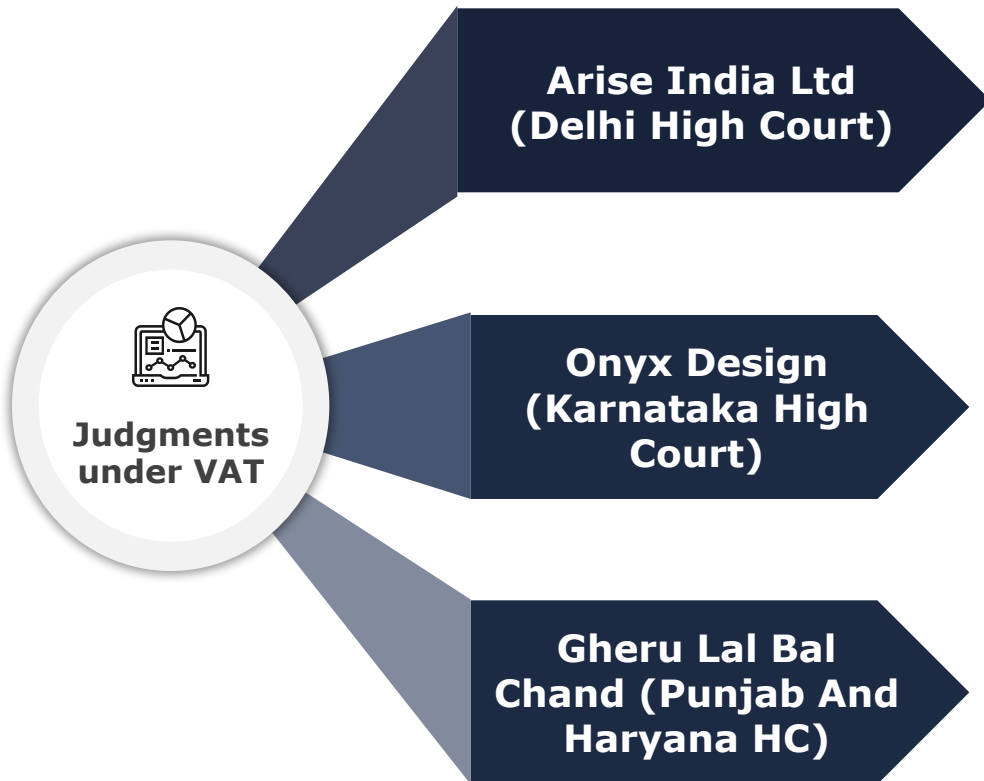
It states that any **discrepancy** in the claim of input tax credit in respect of any tax period, specified in sub-section (3) of section 42 and the details of output tax liable to be added under sub-section (5) of the said section on account of continuation of such discrepancy, shall be made available to the recipient making such claim electronically in **FORM GST MIS-1** and to the supplier electronically in **FORM GST MIS-2** through the common portal on or before the last date of the month in which the matching has been carried out.

On perusal of the aforesaid provisions, it can be said that there is a specific mechanism for reversing the credit in case of the discrepancy in the ITC availed by the recipient against the output liability of the supplier. However, the mechanism has been kept in abeyance due to some technical glitches in the GSTN System.

- ✓ **Condition laid down under Section 16(2)(c) is subject to the provisions of Section 41 read with Rules 69 and 71**
- ✓ **ITC reversal mechanism as laid down in Section 41 read with Rules is kept in abeyance**



- Section 16(2)(c) is **arbitrary** as it doesn't differentiate between tax evaders and bonafide taxpayers
- **Bonafide** recipient should not be penalized for non-payment of tax by supplier
- ***Lex non cogit ad impossibilia***: The law cannot compel the doing of impossibilities
- **No mechanism** to verify whether supplier has actually paid tax to the Government
- Denial of ITC to buyer due to default of supplier would tantamount to shifting the incidence of tax from supplier to the buyer which is unconstitutional
- Buyer would pay double tax on same transaction i.e., one at the time of purchase and another at the time of ITC reversal
- If buyer is denied ITC, it would be wholly unjustified and this causes the deprivation of the enjoyment of the property which is violative of Article 300A of the Constitution of India



In the event that selling dealer fails to deposit the tax collected by him from the purchasing dealer, the remedy for the department would be to proceed against the selling dealer for recovery of such tax. Further, in cases where the department is satisfied that there is collusion of purchasing and selling dealer then proceeding under Section 40A of the DVAT Act can be initiated

It was held that "the benefit of input tax cannot be deprived to the purchaser dealer, if the purchaser dealer satisfactorily demonstrates that while purchasing goods, he has paid the amount of tax to the selling dealer. If the selling dealer has not deposited the amount in full or a part thereof, it would be for the revenue to proceed against the selling dealer."

It held that that no liability could be fastened on a buyer on account of non-payment of tax by the seller in the treasury unless a case of fraud is made out by the Revenue, or unless collusion/connivance between the seller and buyer is established.



It is clarified that the 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 in consonance with the provisions of section 16 of the Act. The **apprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B** conducted before the due date for filing of return in FORM GSTR-3B for the month of September, 2018 **is unfounded as the same exercise can be done thereafter also.**

Authorities cannot initiate recovery proceedings against a purchaser of goods due to the omission to remit tax to the Government on part of the seller

Facts:

The petitioners are traders in Raw Rubber Sheets. They had purchased goods from their seller and made payments thereto, including the tax component. Based on the returns filed by the seller, the petitioners availed input tax credit of the GST paid. Later, during inspection by the authorities, it came to light that the seller did not pay tax to the government, however show cause notice was issued to the petitioner. Consequently, without involving the sellers, the impugned orders came to be passed levying the entire liability on the petitioners to reverse the credit already taken due to non-payment of tax by their seller. Therefore, the petitioner have challenged the said impugned through this writ petition.

Held:

The Hon'ble High Court while allowing the Writ Petition, held the following:

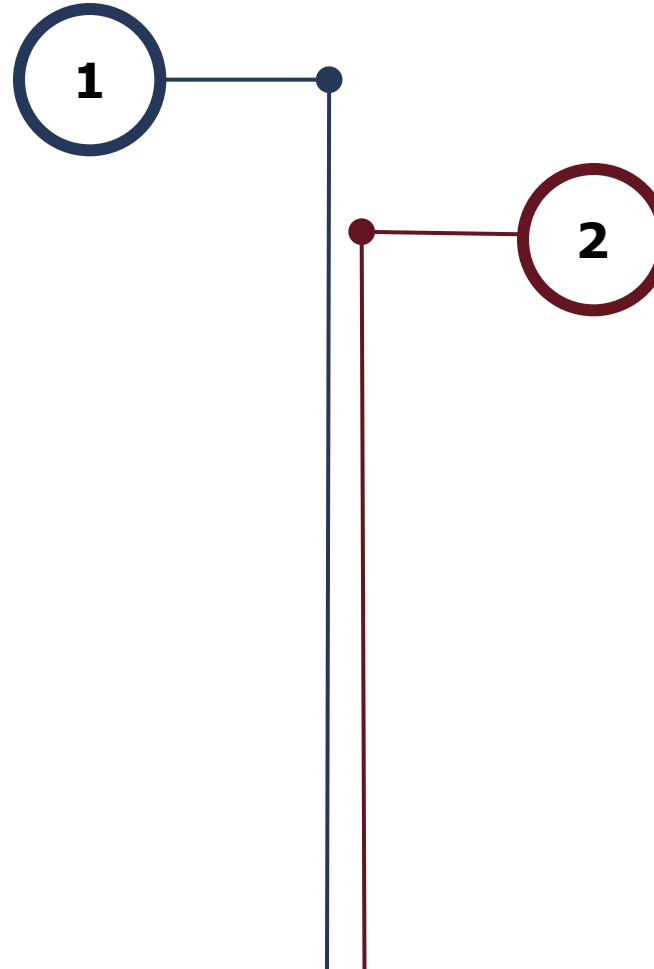
- When it has come out that the seller has collected tax from the petitioners, the omission on part of the seller to remit the tax in question must have been viewed seriously and strict action ought to have been initiated against them
- The impugned orders suffer from fundamental flaws of non-examination of seller in the enquiry and non-initiation of recovery action against seller in the first place

Therefore, the impugned orders are quashed and the matter is remitted back to the file of the authorities

Existence of a enabling section in the statute for the purpose of making Rule is necessary which is absent in case of Rule 36(4)

Decisions

- a) *Academy Of Nutrition Improvement vs. Union of India*
- b) *General Officer ... vs Subhash Chandra Yadav & Anr. (1988 AIR 876)*
- c) *State Of Karnataka And Anrvs H. Ganesh Kamath Etc. (1983 AIR 550)*
- d) *Sukhdev Singh & Ors vs Bagatram Sardar Singh (1975 AIR 1331)*



Whether general power under Section 164 can be used for the purpose of Rule 36(4)?

The Bombay High Court in case of *Nelco Limited v. Union of India* has held that Section 164 of the CGST Act is wide enough to enable the framing of rules fixing a time limit to claim Transitional ITC

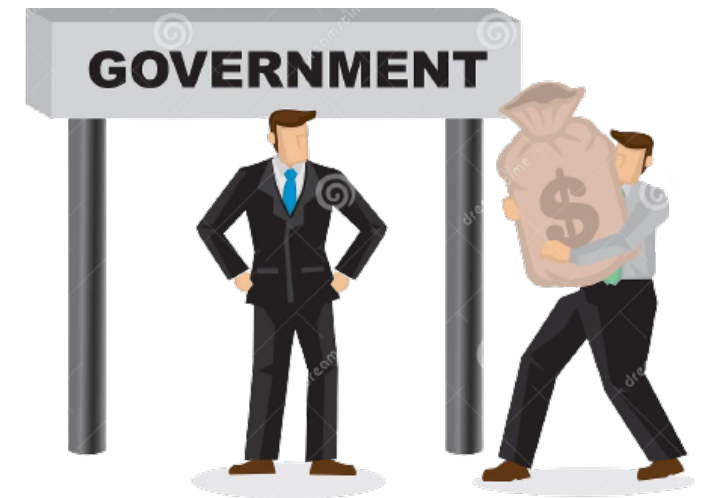


No registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,

1. he is in possession of a tax invoice or debit note
2. ***(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,***
3. *he has received the goods or services or both*
4. *the tax charged in respect of such supply has been actually paid to the Government,*
5. *he has furnished the return under section 39*

Reason for the Proposed Amendment: Extract from Agenda of 39th Council Meeting

*Section 16 of the CGST Act provides for conditions and restrictions subject to which the input tax credit shall be credited to the electronic credit ledger. It would be logical to complete this linkage of outward supplies declared by the supplier with the tax liability, **by also limiting the credit availed in Form GSTR 3B to that reflected in GSTR 2A of the recipient, subject to additional amount available under the rule 36(4).***



Input tax credit – CSR Expenses



- **Section 135 of the Companies Act, 2013** requires every company having a specified net worth or turnover or profit, to contribute at least **two per cent of its average net profit** towards satisfying its corporate social responsibility.
- Schedule VII of the Act and the Companies (Corporate Social Responsibility) Rules, 2014 provide for certain conditions and guidelines which are geared towards advancing CSR objectives.
- This stipulation *inter alia* relates to activities ranging from eradicating extreme hunger and poverty to imparting employment enhancing vocational skills and promoting gender equality.
- Input tax credit availability on CSR Expenses?



Whether CSR expenditure is in the course or furtherance of business?

- CSR activities are a part of the commercial transactions of a corporation, wherein the entity provides certain contributions and earns goodwill, which is crucial part of any corporate undertaking.
- They have to be carried out by certain companies, in absence of which, they can face repercussions
- CSR therefore facilitates the furtherance of a business by being a valuable but also imperative input.

M/s Dwarikesh Sugar Industries Limited, 2021-VIL-168-AAR

- **The AAR observed that the applicant is compulsorily required to undertake CSR activities in order to run its business and accordingly, it becomes an essential part of his business process as a whole.**
- **Therefore the said CSR activities are to be treated as incurred 'in the course of business'.**
- **Taking this into consideration, the Authority concluded that ITC in terms of Section 16, CGST Act, is to be allowed on such transactions.**

M/s.Essel Propack Ltd. vs. Commissioner of CGST, Bhiwandi, 2018 (362) E.L.T. 833 (Tri.-Mumbai)

- CSR not only holistic approach but integrating core business strategy since same addresses well being of all stake holders and not just company's shareholders
- CSR also augmenting credit rating of company as well as its standing in corporate world
- Sustainability of company dependent on CSR without which companies cannot operate smoothly for long period as they are dependent on various stakeholders to conduct business in economically, socially and environmentally sustainable manner i.e. transparent and ethical

Commissioner Of Central Excise, Bangalore Vs Millipore India Pvt Ltd, 2012 (26) S.T.R. 514 (Kar)

"..now the concept of corporate social responsibility is also relevant. It is to discharge a statutory obligation, when the employer spends money to maintain their factory premises in an eco-friendly, manner, certainly, the tax paid on such services would form part of the costs of the final products, and the assessee is entitled to the benefit thereof.."

- Section 17(5) *inter-alia* debars ITC when goods are written off or disposed of by way of **gift or free samples**

Meaning of the term "Gift"

- **Press Release dated 10.07.2017** analysed this expression as under:
 - Gift is made without consideration;
 - It is voluntary in nature
 - Made occasionally
 - It cannot be demanded as a matter of right and one cannot move court of law for obtaining gift
- Section 122 of **Transfer of Property Act** defines "gift" as "*the transfer of certain existing moveable or immoveable property **made voluntarily and without consideration**, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee*"
- The Madras High Court held that *a transaction undertaken due to compulsion or enforcement does not amount to a 'gift' within the meaning of S. 122, TOPA.*
- Thus, the voluntary nature of a gift is recognized in several legal authorities and this disposition runs contrary to the substance of a CSR, which essentially arises out of a legal mandate and not voluntarily

Meaning of the term “**Obligation**”

- The mandatory nature of such CSR expenses take it a step further from ‘duty’ and makes it an obligation or a liability
- “Obligation” means a duty or a liability arising in law or from contract and liability itself means subjection to a legal obligation [***The Punjab National Bank Ltd. v. The Union of India, 1984 SCC Online Del 64***]
- The Calcutta High Court held that the word ‘obligation’ implies not a moral duty, but a legal duty which can be enforced by law and which is imposed upon a person by an outside agency or a third party in respect of the subject-matter [***State of West Bengal v. Iswar Damodar Jew and others 1975 SCC OnLine Cal 136***]
- The CESTAT, New Delhi held that the expenditure on CSR is a statutory requirement under the Companies Act [***Northern Coalfields Ltd. v. Commissioner of GST, Cu. & C.E., 2019 SCC OnLine CESTAT 7515***]

Possible view

- It can be said that CSR activities is a mandate by the statute, thereby making it an obligation and clearly discerning the difference between goods given under CSR and gifts distributed otherwise
- Therefore, a view may be taken that ITC on CSR expenses is not restricted under the expanse of Section 17(5)(h) of CGST Act as gifts
- However, ITC on CSR expenses is highly prone to dispute by the department in which case the relief can be expected at the higher judicial forums only

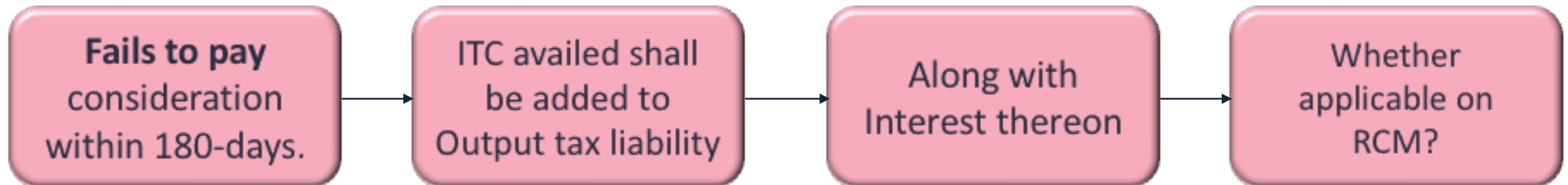
Alternate mechanism

- Avail ITC on CSR expenses in GSTR-3B of the month in which such CSR expenditure is incurred or till September of the next financial year
- Also, reverse such ITC through same GSTR-3B in which such ITC is availed
- Further, once the legal position on availability of ITC on CSR expenses is settled, the ITC can be re-availed without any time limit restriction.



**Payment of consideration
within 180 days**

- **Section 16(2)** – 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 of goods or services along with the tax payable thereon, within a period of **one hundred and eighty days** from the date of issue of invoice by the supplier, the amount equal to 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.
- The recipient shall be entitled to avail Input tax credit on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.
- What does **failure to pay** means?
- What if contract term provide that payment is to be made within 200 days from date of issuance of invoice?



Reversal of Input Tax Credit

As per rule 37

Reversal of input tax credit in case of non- payment of consideration

Failure of Payment within 180 days from the date of issue of invoice shall furnish the details of such supply, the amount of value not paid and amount of ITC availed but not paid to the supplier in FORM GSTR-2 for the month.

Provided that the value of supplies made without consideration as specified in Schedule I shall deemed to have been paid for the purpose of second proviso to sub section (2) of section 16.

Rule 37(2): The amount of ITC which is not paid to the supplier shall be added to the output tax liability of the registered person for the month in which details are furnished.

Rule 37(3): The registered person shall be liable to pay interest at a rate as specified u/s 50 for the period starting from the date of availing such credit till the date when such amount is added in output tax liability is paid.

Rule 37(4): The time limit as specified u/s 16(4) shall not apply to a claim for re-availing of any credit, in accordance with the provision, that has been reversed earlier.

Reversal of ITC owing to 'failure of payment' within stipulated time period

According to 2nd proviso to Section 16(2)(d) of Central Goods and Service Tax Act, 2017 –
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 and 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.



(Supplier)

Goods or services supplied to customer



Recipient fails to pay to the supplier of goods or services within 180 days



(Customer)

The Amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon.

Meaning of Non – Payment or failure to pay

Royal Calcutta Turf Club Vs. Wealth Tax Officer

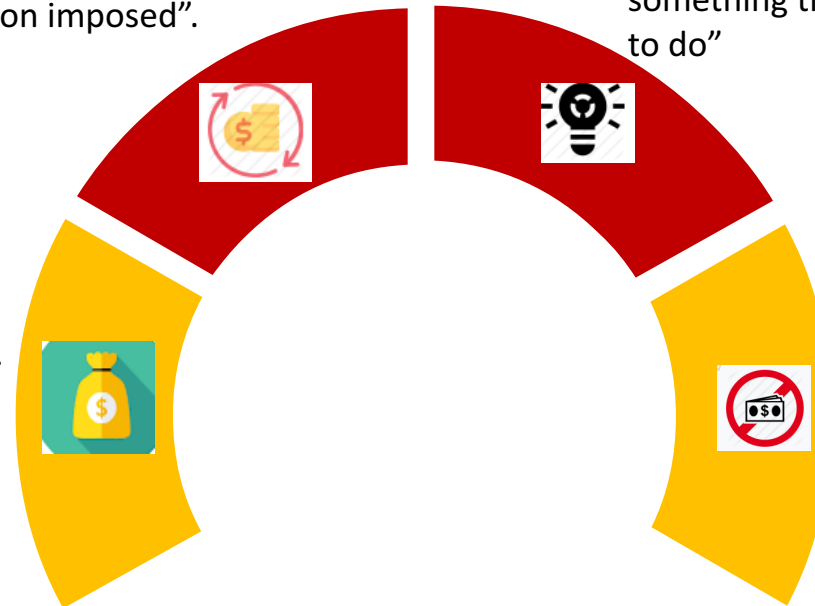
The word Failure means “Non-fulfilment of an obligation imposed”.

Kavungal Kooppakkattu Zeenath Vs. Mundakkattu Sulfiker Ali

“Failure means not doing something that one is expected to do”

Ram Kishore Vs. Bimla Devi and Ors.

The word fails cannot connote the meaning of voluntary refusal. These words do not give a discretion or right to the person



Thattessara Subbaraya Vs. Chinne Gowda &Ors.

“Failure means the there is an omission on the part of the person to do something which it is possible for him to do

In Malaysian Airlines Vs. Union of India – Failure to pay means non-payment, which means failure to pay when due. In the said case, there is a penalty imposed if amount of foreign travel tax collected is not paid to the government, within **fifteen days** from the date of collection. It was held that failure to pay within this prescribed time frame would mean non-payment or failure to pay. If any persons fails to pay within the statutory period, then such person is well within the sweep of the words **“failure to pay”**

Once the statutory period is over and breach in payment of tax is committed, then it is immaterial when the defaulter in future is making the payment. Applying the said judgement, second proviso of section 16(2) of the CGST Act should only trigger **when payment is due**.

DGGI Investigation – ITC Reversal in real estate

Section 17 of the CGST Act restricts the Input tax credit on goods or services or both to so much of the input tax attributable to the taxable supplies including zero rated-supplies made for the purpose of business.

The manner of reversal of Input tax credit is stated in the CGST Rules, 2017:

- Rule 42 – Reversal of credit received on Inputs and Input services
- Rule 43 – Reversal of credit received on Capital Goods

Important to note:

- The reversal of ITC to be done in every tax period.
- Total Input Tax Credit & Reversal of ITC to be declared in GSTR 3B for the said Tax period.
- At the year end, the reversal of ITC for the financial year to be calculated; and any short/excess reversal to be paid/claimed in GSTR 3B.
- Reversal is to be calculated separately for CGST, SGST, IGST and CESS.

ITC Reversal on Electricity Consumption

- Transaction
 - The company is engaged in generation of electricity. Electricity generated by the company is used for both captive consumption and supplying to other person
- Erstwhile Law
 - Reversal required to done on the basis of units consumed
- GST
 - Reversal on the basis of units or turnover?
- Case Study
 - Turnover of company (Supplier of steel) : 100 crores
 - Value of exempt supply/turnover in respect of supply of electricity : 1 crores
 - Ratio of units consumed – Captive Consumption : Supply = 50:50
 - Common Credit – 10 lacs
 - Ratio for reversal : 50:50 or 1:100

ITC Reversal- Rule 42/43

Illustration:

S.No	ITC on Input & Input Services (Rule-42)	CGST	SGST	IGST	Total	
T	Total Amount of Input Tax Credit	1,00,000	1,00,000	2,00,000	4,00,000	
T1	Out of A, ITC -exclusively for Non Business purpose	3,000	3,000	5,000	11,000	
T2	Out of A, ITC -exclusively for exempted Supply	7,000	7,000	20,000	34,000	
T3	Out of A, ITC ineligible under sec 17(5)	5,000	5,000	25,000	35,000	
C1	Amount to be credited to electronic credit ledger	{T-(T1+T2+T3)}	85,000	85,000	1,50,000	3,20,000
T4	ITC -exclusively for Taxable supplies, including Zero Rated	70,000	70,000	1,25,000	2,65,000	
C2	Common Input Tax Credit	(C1-T4)	15,000	15,000	25,000	55,000
D1	Out of G input tax credit attributable to exempted supply	{C2×(E÷F)}	1,132	1,132	1,887	4,151
D2	Common Input tax credit used for non business purpose	{C2×5%}	750	750	1,250	2,750
	Eligible Common Credit		13,118	13,118	21,863	48,099
Total Input tax credit required to be reversed		T1+T2+T3+D1+D2	16,882	16,882	53,137	86,901
Total eligible Input tax credit			83,118	83,118	1,46,863	3,13,099

Assumptions		Amount
Exempt Supplies during the period	E	2,00,000
Taxable Supplies during the period	F1	22,00,000
Zero-rated Supplies during the period	F2	2,50,000
Total Taxable Turnover	F= (F1+F2)	24,50,000
Total Turnover	(E+F)	26,50,000

Whether Exempt supply includes:

- Interest
- Dividend
- Securities



Reversal on Capital Goods is to be done over 5 years

ITC Reversal in real estate

S.No	Description	Amount in crores
1	Total Cost of construction of the project	100
2	Service Tax Cenvat Credit availed in Pre-GST Regime	10
3	ITC (GST) availed from 1.07.2017 to 31.03.2019	3
4	Date of OC	31.3.2019
5	Area unsold on date of OC	33%
Reversals		
6	Cenvat Credit to be reversed	?
7	ITC (GST) to be reversed on receipt of OC	?

1

Reversal of ITC Availed under GST

- ❑ Exempt supply includes Sale of Land; and Sale of building (after completion certificate or First occupancy).
- ❑ Reversal is to be done on the basis of *carpet Area*.
- ❑ For calculating proportionate common credit on exempt portion $\{C2 \times (E \div F)\}$ -
 - E = Carpet Area of :
 - a. Apartments the construction of which is exempt.
 - b. Apartments remaining unsold on the date of completion certificate
 - F = Aggregate Carpet area of the project
- ❑ Reversal is to be calculated finally, from commencement or 1st July 2017, till the date of completion certificate.

Calculation- Project wise
or GSTIN wise ?

2

Reversal of CENVAT Credit availed under service Tax ??

Jurisprudence

- *CCE, Pune v. Dai-Ichi Karkaria Ltd. 1999 (112) E.L.T. 353(S.C.)*
- *H.M.T. V. CCE, Panchkula 2008 (232) ELT 217 (Tri-LB) affirmed by the P&H HC in CCE, Panchkula v. HMT Ltd 2010 TIOL 316 HC P&H.*
- *Hindustan Zinc Ltd. V. UOI 2008 (223) ELT 149 (Raj)*
- *CCE & Cus, Cochini v. Premier Tyres Ltd 2008 (223) ELT 149 (Raj)*

CESTAT

- *M/s Alembic Ltd 2018-CESTATAT-AHM-ST and*
- *M/s Shreno Limited Vs C.C.E & ST*
- *Prajapati Developers vs CCT -CESTAT-Hyd*

CENVAT Credit rules on Reversal??

3

Reversal of Transitional ITC ?

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- ❖ More than 100 Corporates/MNCs across various sectors.
- ❖ Knowledge partner of PHD Chamber , Webtel Electrosoft etc




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Thank You

