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Input Tax Credit under GST - A right or a burden?



Since inception, GST regime has been recognized not merely as a tax reform but also as a business process reform. Undisputedly, principal leitmotif behind implementation of GST lied in removal of cascading tax effect and thereby allowing seamless flow of Input Tax Credit ('ITC'). Considering the significant high rates of GST (average rate of 18%), availment of ITC is a critical consideration for any taxpayer, as availability of the same may determine its survival.

After completion of close to 3 years of implementation of GST regime, a feeling persists in the minds of taxpayers that Government has failed to recognize the substantive character of ITC by providing for numerous conditions to be followed.

In tandem to these conditions, fact that the prevailing IT infrastructure has not introduced various functionalities as initially envisaged under GST (basis which some of the above conditions were introduced) has added to the woes of taxpayers, making fulfilment of some of these conditions impossible. In this article, we have attempted to highlight some of the said conditions which will be prone to non-compliance as well as litigation in future.

Condition A: Actual payment of tax to government

Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 ('CGST Act') provides that ITC shall be available if tax charged in respect of concerned supply has actually been paid to Government. **As such, an arbitrary and impossible liability has been fastened on the recipient of supply for claiming ITC,** specifically when such information is not available to a taxpayer under the GST portal.

Notably, all that a recipient can do is discharge its tax liability by paying the value of supply along with the tax to the supplier. However, there is no mechanism under the GST law basis which the recipient can ensure that tax paid by him to supplier has actually been deposited with the Government. The Government vide this provision has tried to shift its liability to recover the tax from the defaulting supplier and fastened the same on a bona-fide purchaser.

Notably, in the erstwhile regime similar provisions existed under the respective State VAT Laws. However, applicability of those provisions was challenged by taxpayers before their respective jurisdictional High Courts. Various High Courts have decided similar issues in favour of the taxpayers. The Courts harped on the point that in absence of any mala-fide intention, connivance or wrongful association with the selling dealer, no liability can be imposed on the purchasing dealer.

Thus, there is a dire need that Government amends Section 16(2)(c), in order to be in conformity with the objective of CGST Act and the settled legal precedents in that regard. The Government needs to recognize that ITC being a substantial benefit cannot be denied to taxpayers' basis such impossible and harsh provisions. Accordingly, the bona-fide taxpayers are required to be excluded from the scope of applicability of the said condition.

Condition B: ITC eligibility to the extent of matched invoices

The Government has been trying to curb the menace of fake invoicing and excessive ITC and has accordingly issued Rule 36(4) of the Central Goods and Services Tax Rules, 2017 ('CGST Rules'). Under this, the taxpayer can avail ITC on invoices / debit notes which are not reflecting in Form GSTR-2A only to the extent of 10% of the ITC in respect of uploaded invoices / debit notes.

Accordingly, the Government has necessitated for the recipient to reconcile its books of accounts and Form GSTR-2A, to ascertain its matched and unmatched ITC. On this front, the problem being faced by taxpayers is multifold, some of them are as under:

- a. There are inconsistencies in reflection of invoices by supplier and recipient and ITC reflecting in the Form GSTR-2A is never locked, as such mismatch is bound to happen.
- b. Matching of ITC availed on procurements made through small taxpayers will be possible quarterly only.
- c. ITC availed in respect of goods in transit will not be matched on a monthly basis, since some of these goods will be procured at month-end.

Notably, by virtue of this condition Department has started sending auto generated emails to taxpayers, highlighting the cases where ITC availed in Form GSTR-3B is higher than ITC available in Form GSTR-2A. As such, the taxpayer becomes obliged to reply to such notice.

In our view, this condition is unjust for a taxpayer, especially when there is no facility made available by the Government to ensure full compliance with the same. The CAG in its Report dated July 30, 2019¹ has reported that one significant area where the full potential of GST has not been achieved is the roll out of the simplified tax compliance regime. Even after two years of roll out of GST, system validated ITC through "invoice matching" is not in place and non-intrusive e-tax system remains elusive.

Thus, for failure on the part of the Government to provide an efficient IT system, substantive right of ITC should not be denied to taxpayers. Accordingly, till the time an efficient working system is in place, this condition should not be made applicable as a mandatory condition. Notably, matching of invoices was something that was envisaged as a facility available on the GST portal. For Government's failure to provide the same, taxpayers should not be saddled with the burden of ITC by rejecting the same, since these taxpayers could not carry out the manual matching exercise.

In this context, another important question which the Government must clarify is whether this condition then overrides the condition of payment of tax by the supplier, as envisaged under Section 16(2)(c) of the CGST Act? In simple words, if condition under Rule 36(4) is satisfied, does that *ipso facto* means the condition under Section 16(2)(c) stands satisfied? Surely, disputes pertaining to over-riding effect of the said conditions will arise in near future sans any clarification from Government in this regard.



¹ CAG Report No.11 of 2019 - Compliance Audit of Union Government, Department of Revenue (Indirect Taxes – Goods and Services Tax) dated July 30, 2019

Condition C: Possession of valid tax invoice

"We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

- Justice V. R. Krishna Iyer in the case of State of Punjab v. Shamlal Murari, AIR 1976 SC 1177

Under the GST Regime, for availing ITC, possession of a valid tax invoice has been prescribed as a mandatory condition under Section 16(2)(a) of the CGST Act read with Rule 36(1) and Rule 36(2) of the CGST Rules. In terms of Rule 36(2) of the CGST Rules, five particulars (details of the amount of tax charged, description of supply, total value of supply, GSTIN of supplier and recipient and place of supply in case of inter-State supply) are mandatorily required to be mentioned on the invoice, for availing ITC. In our experience, there may be cases wherein one (or more) of these viz. place of supply detail is missing.



At this juncture, it is relevant to take note of settled legal precedents from the erstwhile regime, wherein it has been held that non-fulfillment of procedural requirements qua invoices should not be a ground to deny the substantive benefit of credit to taxpayers². The Courts have held that the substantive requirement for availing ITC is receipt and usage of goods and procedural irregularities vis-à-vis invoices should not impact the availability of substantial right of credit. Accordingly, in our view, the Department should consider these settled jurisprudences. Besides this, the Department should also consider that once the requirement of matching of ITC in Form GSTR-2A is already in place (refer condition B discussed above), possession of a valid invoice is only a procedural requirement. Hence, ITC should not be denied to taxpayers' basis such procedural lapses.

Parting Note

With commencement of departmental audits, disputes relating to fulfillment of conditions for availing ITC are bound to rise. Notably, Government should consider amending the law and simplification of conditions in order to be in conformity with the objective of the CGST Act. Procedural obligations should not stand in way of availment of ITC, which is a substantive benefit granted under CGST Act, especially when the manner to fulfill the same has not been put in place by the Government itself.

² *Shasun Chemicals and Drugs Ltd. v. CESTAT*, 2018 (11) GSTL J39 (Mad.), *Uni Cast Pvt. Ltd. v. CCE*, Meerut, 2016 (331) ELT 369 (All.)

Importantly, when around 93% of the taxpayers in India have turnover less than 5 crores, the key question that arises here is whether such small taxpayers should be burdened with such complex compliances for availing ITC (their right), or should the Government look-forth to some simplification measures. Surely, for these small taxpayers, the GST regime is not merely a good and simple regime.



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