



**NITYA**  
tax associates



**Verification of mismatched  
ITC under GST – Whether a  
stitch in time?**

Squinting through the ocean of notices demanding Input Tax Credit ('ITC') due to difference between GSTR-3B and GSTR-2A, taxpayers were looking for a stitch in time to save their nine for a very long time. Lately, the Pandora of rulings and clarifications have been proven insufficient in creating enough room to swing the moot objective of GST - *seamless flow of ITC*. While numerous conditions for availing ITC were creating constant hardships for taxpayers, **Circular No. 183/15/2022 - GST** dated **December 27, 2022** ('Circular') has added another feather in the cap of disenchantment.

## ITC - A right / property of taxpayer and related issues

Section 16 of the CGST Act lays down various conditions for availing ITC. Whilst the conditions of having a tax paying document and receipt of goods and services are reasonable for taxpayers, other conditions of matching ITC with GSTR-2A / 2B and ITC eligibility to recipient only after payment of tax to Government by supplier are in violation to the legal principle of ***Lex non cogit ad impossibilia***<sup>1</sup>. This is particularly so as no matching provisions were implemented to ensure payment of tax by supplier before availing ITC by the recipient.

ITC is a vested right of taxpayers. It is like an advance with the Government till its adjustment against payment of output tax liability. The Hon'ble Supreme Court<sup>2</sup> took a front seat in backing this vested right. If a taxpayer is deprived of his vested right without following due process of law, that would, tantamount to violation of Article 265 of the Constitution of India and would render ITC so denied as collection of tax without authority of law. Furthermore, ITC is a 'property' of taxpayers as per Article 300A of the Constitution of India, which provides that no person shall be deprived of his property, except by following due process of law. The Apex Court<sup>3</sup> was, nowhere behind in putting up a rubber stamp to this issue and affirmed the same.

Rule 36(4) of the CGST Rules was inserted<sup>4</sup> only on October 9, 2019. CBIC also clarified<sup>5</sup> that such matching shall apply prospectively. Section 16(2)(aa) of CGST Act was introduced w.e.f. January 1, 2022, mandating reflection of invoices uploaded by suppliers in GSTR-2B for ITC availment. Prior thereto, there was no enabling provision for ITC matching under the CGST Act, leaving the Rule under the cloud of being challenged on constitutional validity front. In Authors' considered view, throughout GST journey, these amendments have failed the objective of GST i.e., *seamless flow of ITC*.

After 30<sup>th</sup> GST Council Meeting, the Government's own **Press Release** dated **October 18, 2018** elucidated that GSTR-2A is a mere facilitation statement and it doesn't impact ITC eligibility of recipient. It also clarified that apprehension related to ITC eligibility basis its reconciliation between GSTR-3B and GSTR-2A is unfounded.

## Impact of Circular

Various scrutinies, audits, investigations etc. by tax officers were initiated, basis such ITC difference even for period before insertion of Rule 36(4). Owing to this, the Central Government issued Circular and clarified ways to deal with such ITC differences for Financial Year ('FY') 2017-18 and 2018-19. The Circular issued by CBIC seems to have been drafted along the fences of recent internal Circular issued by Maharashtra Government<sup>6</sup> on identical aspects.

The Circular started by supporting taxpayers by acknowledging existence of feeble GST common portal and absence of any mandate for GSTR-2A matching before October 9, 2019. However, in the fine print, the Circular detoured to the gloomy alley of ITC verification process and emphasized on fulfillment of conditions laid down under Section 16 of the CGST Act.

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<sup>1</sup>Law cannot force a person to do an impossible act

<sup>2</sup>Eicher Motors Private Limited v. UOI, 1999 (106) ELT 3 (SC)

<sup>3</sup>Bharti Airtel Limited v. UOI [2021 (54) G.S.T.L. 257 (S.C.)]

<sup>4</sup>Notification No. 49/2019 - Central Tax dated October 9, 2019

<sup>5</sup>Circular No. 123/42/2019-GST dated November 9, 2019

<sup>6</sup>Internal Circular no. 02A of 2022, Maharashtra, dated February 25, 2022

In subsequent paragraphs, Authors have pondered upon irrational procedure prescribed by CBIC in Circular. Instead of clarifying measures for dealing with ITC differences, Circular has created new confusions for the industry. Circular has a boomerang effect on taxpayers' expectations as it demolished the same and thrusting the taxpayers into unwarranted scrutiny proceedings.

### **Payment of tax by supplier**

Section 16(2)(c) allows recipient to avail ITC subject to payment of tax by supplier. To comply with this condition, Circular has provided certification requirement. Where difference between ITC claimed in GSTR-3B and ITC reflecting in GSTR-2A for a FY exceeds Rs. 5 Lakhs, the recipient needs to submit to the Proper Officer, a certificate from Chartered Accountant / Cost Management Accountant of concerned supplier, certifying that supply was actually made and tax was paid to Government. For ITC differences upto Rs. 5 Lakhs, recipient needs to submit said certificate from supplier himself.

Interestingly, there is no enabling provision under the CGST Act that requires a taxpayer to submit above stated certificate. In Authors' view, Circular which intended to resolve grievances of taxpayers has imposed additional conditions with no statutory backing. Alas, the road to hardships is paved with good intentions only!

### **Fate of ongoing proceedings**

While Circular has encapsulated ongoing proceedings in scrutinies / audits / investigations, etc., for FY 2017-18 and 2018-19, it specifically excludes completed proceedings, leaving the same to destiny.

### **Fate of similar issues**

Arguendo, assuming without conceding that Circular is valid and intends to resolve jeopardy of the taxpayers for the period when neither Rule 36(4) nor Section 16(2)(aa) existed, the Circular is silent for the period from April 1, 2019 to September 30, 2019 i.e., the period prior to insertion of Rule 36(4). Moreover, the Circular revolves around focusing on ways to satisfy condition under Section 16(2)(c) in the garb of ITC matching without having statutory back-up. Authors feel that the procedure prescribed in the Circular for certification could be applied by taxpayers for period beyond the stated period also to satisfy compliance of Section 16(2)(c) which has been on the Statute since beginning.

### **Fate of validity of the Circular**

Important to note that the validity of Sections 16(2)(c) as well as 16(2)(aa) are under challenge before the Constitutional Courts on the ground that bonafide recipients should not be treated at par with fraudulent ones. Further, on the same ground, in erstwhile regime, Constitutional Courts have either struck down similar provision denying ITC for these reasons or applied doctrine of reading down in favor of bonafide taxpayers.

Interestingly, the Circular has also erred to save one's breath for ITC difference due to suppliers not being traceable or being non-cooperative for any reason. Hence, in absence of valid certification from such suppliers, door of litigation will be the last resort for bona-fide recipients. Consequently, the vicious Circle of hardships shall revolve around the industry and the Circular is likely to be challenged before the Courts.

## **Parting Comments**

The Circular is just a tip of the iceberg amongst hardships being faced by taxpayers apropos ITC availment. It has put taxpayers in the dire straits by giving another jolt in complying with ITC conditions. Taxpayers' anguish is unmeasurable, and their agony is par consoling. The Government has taken a summersault by repudiating its 2018 Clarification, thus leaving the taxpayers in a lurch. The ITC compliance situation is in a state of awry. The interpretation and practical implementation of the Circular by the department will decide whether the move has turned out to be actually a stitch in time to save nine or another prick for taxpayers. It would be interesting to watch this space!

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