



NITYA
tax associates



**Rule 37A– A failed attempt to
fight a losing battle**

Even after five and half years of GST implementation, Government still mistrusts and condemns bonafide taxpayers from availing their vested right of ITC. Not a while ago, the Government legalized its long-held ambition of mandatory ITC matching under GST law by inserting Section 16(2)(aa) in the CGST Act. A wisely plotted amendment, which has finally propelled taxpayers to mandatorily match their ITC from GSTR-2B and has pulled the plug on all future challenges to matching provision.

Introduction of Rule 37A *vide* a recent Notification¹ is an attempt to safeguard another bad provision of law [Section 16(2)(c) read with Section 41] that deprives bonafide recipient from its validly availed ITC due to supplier's default in payment of tax to Government. But is this an equally wise amendment or an impulsive failed attempt with multiple defects? The Authors through this article have tried to analyze the same in detail.

Section 16(2)(c) restricts recipient's ITC on supplies unless tax charged in respect of such supply is paid to the Government. Effective October 1, 2022, Section 41 of the CGST Act was amended to provide that recipient can avail ITC on self-assessment basis. Subsequently, if supplier doesn't pay tax to Government in respect of such supplies, recipient is required to reverse ITC along with interest (in prescribed manner) which can be re-availed as and when supplier pays tax. Rule 37A aims at providing such manner for reversal of ITC and re-availment thereof.

Defect No.1 – Non-alliance between Parent legislation and Executive legislation

While Section 16(2)(c) read with Section 41 requires ITC reversal if tax with respect to said supplies is not paid to Government, Rule 37 requires ITC reversal if supplier does not file GSTR-3B of a particular tax period up to certain time limit.

There could be many cases where supplier **files GSTR-3B but does not pay GST on all supplies made**. By following the manner prescribed under Rule 37, recipient can easily escape ITC reversal requirement even if GST on said supplies is not paid by supplier to Government. On the other hand, GSTR-3B is not the only mode of payment of tax under GST law. In many cases like on suo-moto realization of past liabilities or in case of recoveries by authorities, **GST is paid through DRC-03**. If Rule 37 is followed, recipient will have to reverse ITC in cases where supplier has satisfied substantive condition of payment of GST (through DRC-03) but has failed to file GSTR-3B.

Hence, the executive legislation fails to implement and enforce the parent legislation in its true sense.

Defect No.2 – The puzzling dates and interplay with Section 50

Rule 37A requires recipient to reverse ITC till November 30 (without any interest), if supplier has not furnished GSTR-3B till September 30 of the Financial Year ('FY') next to FY **in which ITC is availed**. In other words, if invoice is issued in Year 1, ITC is availed in Year 2, ITC reversal would trigger in Year 3. It seems like legislature has mistakenly linked tax payment date with ITC availment date instead of invoice date. This will unnecessarily spread reconciliations over the period of 3 years and grant undue benefit to malafide people who will use Government's money without any intention of payment of tax to Government for 1 year and reverse it after 1 year without any interest.

To the contrary, Section 50(3) levies interest on wrongful utilization of ITC. The open question here is whether such ITC qualifies to be wrongfully utilized ITC or not? Furthermore, the gap between requirement of filing of GSTR-3B till September 30 and requirement of ITC reversal till November 30 is unclear as to what will happen if supplier files GSTR-3B in October?

¹**Notification No. 26/2022 – Central Tax** dated **December 26, 2022** ('Notification')

Defect No.3– The defect remains uncured

Section 16(2)(c) read with Section 41 is under challenge before various High Courts on the grounds that it fails to distinguish between bonafide and fraudulent taxpayers and that it forces recipient to perform an impossible task of ensuring payment of tax by supplier, without providing mechanism to do the same. The Madras High Court in the case of ***DY Beathel Enterprises v. STO, 2021-VIL-308-MAD*** has already pronounced a favorable judgment on this issue.

Notably, introduction of Rule 37A has failed to bring any change to aforementioned grounds of challenge as this also continues to place bonafide and fraudulent taxpayers on same footing and also fails to provide guaranteed mechanism to ensure payment of GST by supplier. Rather it places a new condition of ensuring filing of GSTR-3B by supplier which was never a requirement under parent statute. Hence, Rule 37A is set to be challenged by taxpayers on similar grounds.

Concluding remarks

To conclude, Government these days is in full force and is taking every possible step to implement GST law in the manner it has aspired to do since advent of GST. In other words, it is trying to bring corrective amendments in every provision which is being challenged by taxpayers before the court of law. While some attempts succeed and some fail like present amendment, the interesting part here would be to see how long the battle around Section 16(2)(c) continues and who wins at last!!! Till then, irrespective of multiple defects in the provision, the department has got another tool in form of Rule 37A to demand ITC reversals and taxpayers have got another duty to ensure filing of GSTR-3B by suppliers.



Aasmee Mangla
Associate Partner
(Author)
NITYA Tax Associates



Swati Goyal
Associate
(Co-Author)
NITYA Tax Associates



Rupanshu Bansal
Executive
(Co-Author)
NITYA Tax Associates