

**GST CERTIFICATE COURSE
{ORGANISED BY VOICE OF CA}
SESSION 3**

By:

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Input Tax Credit [Eligibility Challenges]



**Input
Tax
Credit**

RELEVANT PROVISIONS, RULES & CIRCULAR

Section	Provision
Section 16	Eligibility and Conditions for taking Input Tax Credit
Section 17	Apportionment of Credit and Blocked Credit
Section 18	Availability of credit in special circumstances
Section 19	Taking input tax credit in respect of inputs and capital goods sent for job work.
Section 20	Manner of distribution of credit by Input Service Distributor
Section 21	Manner of recovery of credit distributed in excess

RELEVANT RULES

- **Rule 36 Documentary requirements and conditions for claiming input tax credit**
- **Rule 37 Reversal of input tax credit in the case of non-payment of consideration**
- **Rule 38 Claim of credit by a banking company or a financial institution**
- **Rule 39 Procedure for distribution of input tax credit by Input Service Distributor**
- **Rule 40 Manner of claiming credit in special circumstances**
- **Rule 41 Transfer of credit on sale, merger, amalgamation, lease or transfer of a business**
- **Rule 41A Transfer of credit on obtaining separate registration for multiple places of business within a State or Union territory**
- **Rule 42 Manner of determination of input tax credit in respect of inputs or input services and reversal thereof**
- **Rule 43 Manner of determination of input tax credit in respect of capital goods and reversal thereof in certain cases**
- **Rule 44 Manner of reversal of credit under special circumstances**
- **Rule 45 Conditions and restrictions in respect of inputs and capital goods sent to the job worker**

RELEVANT CIRCULARS

Circular	Description
47/21/2018 GST Dated 08.06.2018	Clarification of certain issues under GST
71/45/2018 GST Dated 26.10.2018	Clarifications of issues under GST related to casual taxable person and recovery of excess Input Tax Credit distributed by an Input Service distributor
72/46/2018 GST Dated 26.10.2018	Circular to clarify the procedure in respect of return of time expired drugs or medicines
92/11/2019 GST Dated 28.03.2019	Clarification on various doubts related to treatment of sales promotion schemes under GST
96/15/2019 GST Dated 28.03.2019	Clarification of issues in respect of transfer of input tax credit in case of death of sole proprietor

IMPORTANT DEFINITIONS



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IMPORTANT DEFINITIONS UNDER ITC

Capital goods [Sec 2(19)]	<ul style="list-style-type: none">• Goods, the value of which is capitalized in the books of accounts of the person claiming the input tax credit; and• Which are used or intended to be used in the course or furtherance of business.
Input [Sec 2(59)]	<ul style="list-style-type: none">• Any goods other than capital goods;• Used or intended to be used by a supplier for in the course or furtherance of business.
Input Service [Sec 2(60)]	<ul style="list-style-type: none">• Any service; used or intended to be used by a supplier in the course or furtherance of business
Input Tax Sec [2(62)]	<p>“input tax” in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—</p> <ul style="list-style-type: none">✓ the integrated goods and services tax charged on import of goods;✓ the tax payable under the provisions of sub-sections (3) and (4) of section 9;✓ the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;✓ the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or✓ the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy

IMPORTANT DEFINITIONS UNDER ITC

Input Tax Credit [Sec 2(63)]	<ul style="list-style-type: none">• “input tax credit” means the credit of input tax.
Exempt Supply [Sec 2(47)]	<p>“exempt supply” means supply of any goods or services or both which attracts</p> <ul style="list-style-type: none">✓ nil rate of tax or✓ which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and✓ includes non-taxable supply;
Exempt Supply [Sec 17(3)]	<p>The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include</p> <ul style="list-style-type: none">✓ supplies on which the recipient is liable to pay tax on reverse charge basis,✓ transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building
Exempt Supply [Explanation Rule 43]	<p>For the purposes of this clause, it is hereby clarified that the aggregate value of exempt supplies and the total turnover shall exclude the amount of any duty or tax levied under entry 84 and entry 92A of List I of the Seventh Schedule to the Constitution and entry 51 and 54 of List II of the said Schedule;</p>

IMPORTANT DEFINITIONS UNDER ITC

Motor Vehicle [Sec 2(76)]

- “motor vehicle” shall have the same meaning as assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988;
- [Section 2(28) of Motor Vehicles Act, 1988]. Motor vehicle or vehicle means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres.

Non-Resident Taxable Person Sec 2(77)

“non-resident taxable person” means any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India

INPUT TAX CREDIT

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graph TD; A[INPUT TAX CREDIT] --- B[ELIGIBILITY AND CONDITION FOR ITC]; A --- C[BLOCKED CREDIT]; A --- D[SPECIFIC SITUATIONS]
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**ELIGIBILITY AND
CONDITION FOR
ITC**

**BLOCKED
CREDIT**

**SPECIFIC
SITUATIONS**

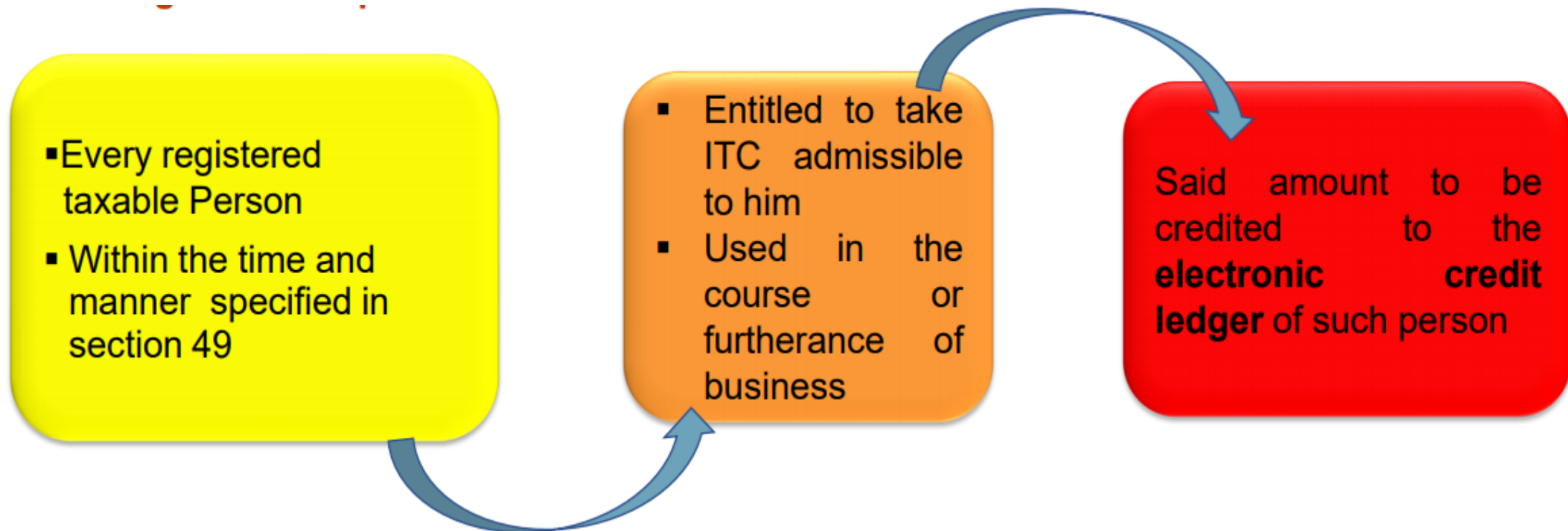
ELIGIBILITY AND CONDITIONS FOR TAKING INPUT TAX CREDIT



16. Eligibility and conditions for taking input tax credit

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

Liability to pay tax u/s 9 s on every 'Taxable Person', whereas ITC can be claimed only by a 'Registered Person'.



16. Eligibility and conditions for taking input tax credit

(1) Every registered person shall, subject to such conditions and **restrictions as may be prescribed** and in the **manner specified in section 49**, be **entitled to take credit of input tax charged** on any supply of goods or services or both 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**.

Liability to pay tax u/s 9 s on every 'Taxable Person', whereas ITC can be claimed only by a 'Registered Person'.

2 (107) "Taxable Person" means a person who is registered or liable to be registered under section 22 or section 24;

2 (94) "Registered Person" means a person who is registered under section 25 but does not include a person having a Unique Identity Number

As person who is liable to be registered under GST but does not get himself registered will be liable to pay tax on outward supplies made, but ill not be eligible to avail/use ITC in respect of gods and services used in making outward supply even if they are used in course or furtherance of business.

It is also important to observe the words refer to the registered taxable person in question and not the legal entity.

Registration under GST are required to be obtained State wise. There is no centralized registration under GST unlike in erstwhile service tax regime. Registration in one State does not *ipso facto* means registration in other state. A separate registration will have to be obtained in each and every state in accordance with the provisions of the law and all such registered persons shall be treated as 'Distinct Persons' registered in one state and not in other states.

So, input tax paid in a State must not be in relation to the business of a taxable person in another State, albeit belonging to the same person

For example, A Company has Branch-A which is a registered taxable person in Andhra Pradesh conducts conference in a hotel in Lonavla (Maharashtra) where CGST-SGST is charged by the hotel. This Company also has Branch-M which is a registered taxable person in Mumbai, Now the provisions of section 16(1) operate as follows:

- CGST-SGST charged by the hotel in Lonavla (Maharashtra) is 'used in the business of Branch-A' in Andhra Pradesh and not in the business of Branch-M in Mumbai;
- Hotel would not be aware about the above fact and would not resist to issue the bill in the name of Branch-M because both are branches of the same Company;
- Since, CGST-SGST has been charged by the hotel, input tax credit would not be available to Branch-A as tax paid in Maharashtra is not a creditable tax in Andhra Pradesh;

- Branch-M may be compelled to forego the tax paid to the hotel. However, there may be an urge to save this loss by providing the GSTIN of Branch-M to the hotel.
- But, Branch-M in Mumbai cannot justify this input tax credit as it is not **‘used by him’** in **‘his business’** but it is ‘used by another (distinct person)’ in ‘that other (distinct persons’) business’;
- Care should be taken to verify ‘whose’ business each input tax credit relates to, that is, which is the exact distinct person who is eligible to each item of credit;
- If nexus is established between the services of the hotel and the ‘business’ of Branch-M, input tax credit may be availed by Branch-M.

SECTION 16(2) Conditions for taking Input Tax Credit

(2) Notwithstanding anything contained in this section, 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, -

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both

Explanation—For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person

Sec 16(2)(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 utilization of input tax credit admissible in respect of the said supply.

Section 16(2)(c) provides the condition that the tax for which ITC is availed should actually be paid to the Government. However, the said provision is effectively in operational as on date as it is subject to the provisions of section 41 and 43A.

Section 43A has not been made effective till date making the entire provision of section 16(2)(c) as in operational. For this very reason Rule 36(4) was introduced as a backdoor entry to Section 43A.

Sec 16(2)(d)-

He has furnished the return under section 39:

He is in possession of a tax invoice or debit note or other tax paying document

Tax is actually paid to the Government

He has received goods or services or both

He has furnished the return under section 39

ITC Eligibility

PROVISO TO SECTION 16(2)- GOODS RECEIVED IN LOTS

- Provided that 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**.

Actual Receipt Vs Constructive receipt (BGM of ICAI - receipt of goods may be said to be complete when goods have been supplied as per the recipient's instructions and the supplier is discharged from any further liability on such goods)

PROVISO TO SECTION 16(2) READ WITH RULE 37 –PAYMENT FOR THE INVOICE TO BE MADE WITHIN 180 DAYS

- Provided further that 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 along with tax payable thereon within a period of 180 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 at the rate notified under sub-section (1) of section 50 from the date of availing credit till the date when the amount added to the output tax liability is paid.
- Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon

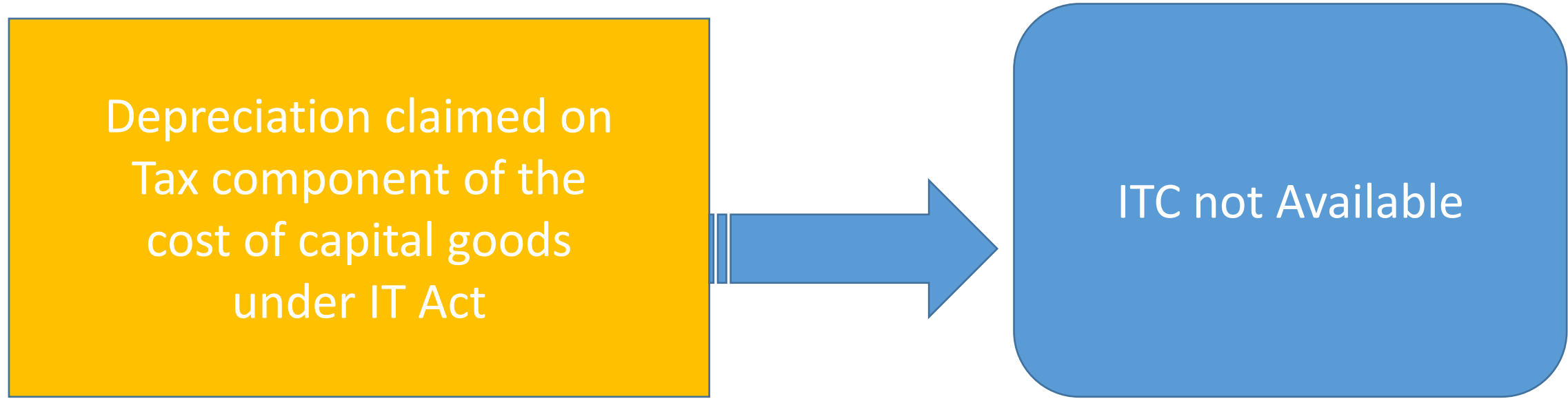
EXCLSIONS:

- The condition of payment of value of supply plus tax within 180 days does not apply in the following situations:
 - (a) Supplies on which tax is payable under reverse charge
 - (b) Deemed supplies without consideration
 - (c) Additions made to the value of supplies on account of supplier's liability, in relation to such supplies, being incurred by the recipient of the supply

Important Point To Remember:

- *PROVISO TO RULE 37 –PAYMENT FOR THE INVOICE TO BE MADE WITHIN 180 DAYS*
- Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16
- [Proviso inserted vide Not. No. 26/2018- CT, dt. 13.06.2018](#)
- Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of section 15 shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.

SECTION 16(3) If depreciation claimed on tax component, ITC not allowed



Section 16(4) – Time limit for taking ITC

*A registered person shall not be entitled to **take input tax credit** in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.*

No ITC can be taken after the due date of return of September following the end of the financial year. But the question now arises when a credit is said to have been taken?

Is credit is said to be taken only when it is claimed in return. Sec 16(2)(d) provides that ITC cannot be taken unless return u/s 39 is filed. Does this means that ITC can be said to be taken only when it is claimed in return or filing of return is just a procedural requirement whereby the amount of ITC taken is declared by the registered person?

Can ITC which was duly considered while preparing books of account but was inadvertently missed out from reporting in relevant return be denied on the ground as provided in section 16 (4)?

Can a substantive benefit be denied for procedural lapse?

It is a settled law that a substantive claim/benefit cannot be denied for procedural lapse.

The time limit u/s 16(4) does not apply to claim for re-availing of credit that had been reversed earlier.

SECTION 16(4) TIME LIMIT FOR AVAILING ITC

Due date of filing of Return for the month of September of the succeeding Financial Year

Due date of filing of Annual Return of the Financial Year

Whichever is Earlier



RULE 36(1)- Documentary requirements and conditions for claiming input tax credit

(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;

(b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;

(c) a debit note issued by a supplier in accordance with the provisions of section 34;

(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;

(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54

Proviso to Rule 36(2) inserted vide Not. No. 39/2018-CT, dt.04.09.2018

- The documents basis which ITC is being taken should contain at least the following details:
- Amount of tax charged
- Description of goods or services
- Total value of supply of goods and/or services
- GSTIN of the supplier and recipient
- Place of supply in case of interState supply

Rule 36(3)- No ITC of tax paid towards demands involving fraud

- No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any *demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.*

Rule 36(4) introduced with effect from 9th Oct 2019, Notification 49 of 2019[Restrictions for claiming ITC]

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 suppliers under sub-section (1) of section 37, **shall not exceed 10 per cent**[substituted,w.e.f.1.01.2020, vide Not. No.75/2019-CT, dt. 26.12.2019]]. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.

Circular 123/42/2019-GST dated 11.11.2019 was issued to clarify as under:

Sl. No	Issue	Clarification
3.	FORM GSTR-2A being a dynamic document, what would be the amount of input tax credit that is admissible to the taxpayers for a particular tax period in respect of invoices / debit notes whose details have not been uploaded by the suppliers?	The amount of input tax credit in respect of the invoices / debit notes whose details have not been uploaded by the suppliers shall not exceed 20% of the eligible input tax credit available to the recipient in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub- section (1) of section 37 as on the due date of filing of the returns in FORM GSTR-1 of the suppliers for the said tax period. The taxpayer may have to ascertain the same from his auto populated FORM GSTR 2A as available on the due date of filing of FORM GSTR-1 under sub-section (1) of section 37.

Proviso to Rule 36(4) inserted vide Not. No. 30/2020-CT, dt. 03.04.2020

- Provided that the said condition shall apply cumulatively for the period **February, March, April, May, June, July and August, 2020** and the return in FORM GSTR-3B for the **tax period September, 2020** shall be furnished with the **cumulative adjustment of input tax credit** for the said months in accordance with the condition above.

Aforesaid circular requires the registered person to verify the eligibility of ITC from GSTR-2A as on the due date of filing of GSTR-1 based on which ITC can be claimed.

The said circular is ultra vires the rule itself as the rule requires that ITC is restricted in respect of those supplies details of which are not uploaded in GSTR-1.

What will be the case where GSTN no. has been wrongly provided while filing GSTR-1 but details of invoice is duly provided or where the transaction is inadvertently reflected as B2C while filing GSTR-1.

In such cases the requirement of rule is satisfied however, the said invoices will not be reflected in GSTR-2A of the recipient.

Also, GSTR-1 are being filed by two different categories of suppliers-

(a) Suppliers having turnover more than Rs. 1.5 Cr where monthly GSTR-1 is filed

(b) Suppliers having turnover upto Rs. 1.5 Cr where Quarterly GSTR-1 is filed

GSTR-2A can be verified monthly only in respect of those suppliers filing monthly GSTR-1 as its due date is before the due date of filing of GSTR-3B.

However, same is not the case for suppliers filing quarterly GSTR-1 where the due date of filing of GSTR-1 is well beyond the due date of filing of GSTR-3B which is to be done on monthly basis.

CBIC is expecting something impossible to do by Tax Payers i.e. to verify GSTR-2A of a future date.

Another aspect to this rule is applicability of interest u/s 50.

Eligible credit to be availed is dependent on what is reflected in GSTR-2A for the period. What if credit is availed in excess of restriction specified in rule 36(4) which was though eligible but details of which were not uploaded by supplier in GSTR-1 and were only reflected at a later date.

Excess credit so availed becomes ineligible credit by virtue of Rule 36(4) and will remain so till the date same is reflected in GSTR-2A.

Can there be liability to pay interest u/s 50 on such ITC which was though eligible but became ineligible by the virtue of Rule 36(4)?

Also there will be liability to pay interest on the supplier for delayed payment of Tax. So can, Govt. claim interest on one transaction from two different persons?

Constitutional validity of Rule 36(4) also comes under scanner as the whole matching concept based on which rules for availing ITC were framed never got implemented which had the option for recipient on which ITC was availed but were inadvertently missed by supplier.

Constitutional validity of Rule 36(4) has been challenged in Delhi High Court as being ultra vires section 41, 42 and 43 of the CGST Act r.w. section 16 which lays down the entire scheme of matching, verifying and validating credit.

It is also further submitted that Rule 36(4) finds its reference in Section 43A which is still inoperative as on date.

Credit to be allowed based on records available even if not claimed in return.

Case Name : **M/s Ad Vision Vs CST (CESTAT Ahemdabad)**

Appeal Number : Appeal No. ST/431/2010

Date of Judgement/Order : 10/11/2010

Related Assessment Year :

Courts : [All CESTAT](#) (936) [CESTAT Ahmedabad](#) (125)

In this case, the Service Tax demand has been confirmed on the ground that the service tax payable has not been debited in the CENVAT Credit account and it has not been reflected in the ST 3 return. In view of the fact that even in the cases of clandestine removal in Central Excise matters, while confirming the demand, the benefit of CENVAT Credit, subject to verification of records that proper documents are available and raw input/ capital goods have been received, the benefit of CENVAT Credit is allowed.

CESTAT held that this being a technical ground that the appellant did not make debit of the CENVAT Credit and did not make proper entries in the ST-3 return, confirmation of service tax demand is not justifiable

INPUT TAX CREDITS –Settled Positions

- Input tax credit is indefeasible -Collector Of Central Excise, Pune Versus Dai Ichi Karkaria Ltd -1999 (112) E.L.T. 353 (S.C.)
- No demand can not be made for recovery of Cenvat Credit that was validly earned by the assessee –Eicher Motors Ltd VS Union of India 1999(106)ELT3(SC)
- No reversal of credit on unsold flats –Alembic Ltd. 2019-TIOL-1495-HC-AHM-ST
- Credit of ITC is not an absolute right but a conditional one and subject to fulfilment of conditions-ALD Automotive Pvt. Ltd. V. Commercial Tax Officer 2019 (13) SCC 255
- ITC cannot be denied for procedural lapses if substantive conditions are satisfied

APPORTIONMENT OF CREDIT AND BLOCKED CREDIT



Blocked Input Tax Credit

Section	Provisions
17(1)	Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes , the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.
17(2)	Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies
17(3)	The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.
	<i>[Explanation. — For the purposes of this sub-section, the expression “value of exempt supply” shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.]</i>

Section	Provision
17(4)	<p>A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply with the provisions of sub-section (2), or avail of, every month, an amount equal to fifty per cent. of the eligible input tax credit on inputs, capital goods and input services in that month and the rest shall lapse : Provided that the option once exercised shall not be withdrawn during the remaining part of the financial year :</p>
	<p>Shall not apply to supplies made by one RP to another RP having the same PAN Provided further that the restriction of fifty per cent. shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number</p>
17(5)	<p>Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-</p>

Section 17(5)(a)

motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:-

- (A) further supply** of such motor vehicles; or
- (B) transportation** of passengers; or
- (C) imparting training on driving** such motor vehicles;



- When ITC is available and not blocked
- vehicles are used for
 - ✓ *further supply of such vehicles or*
 - ✓ *transportation of passengers or*
 - ✓ *imparting training on driving of such motor vehicles*

- 17(5)(aa)
- vessels and aircraft except when they are used—
 - (i) for making the following taxable supplies, namely:-
 - (A) further supply of such vessels or aircraft; or
 - (B) transportation of passengers; or
 - (C) imparting training on navigating such vessels; or
 - (D) imparting training on flying such aircraft;
 - (ii) for transportation of goods;



- **17(5)(ab)**
- services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):
- **Provided that the input tax credit in respect of such services shall be available-**
 - (i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;
 - (ii) where received by a taxable person engaged-
 - (I) in the manufacture of such motor vehicles, vessels or aircraft; or
 - (II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;



- 17(5)(b)
- the following supply of goods or services or both
 - (i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person **for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;**



(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.



- [Section 17\(5\)\(c\)](#)

- works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;



- 17(5)(d)
- goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.
- **Explanation.**—For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

The Hon’ble Orissa High Court in Safari Retreats Private Limited Vs Chief Commissioner of Central Goods & Service tax in W.P. (C) No. 20463 of 2018 vide order dated April 17 2019 read down section 17 (5) (d) of the CGST Act for the purpose of interpretation in continuation to give benefit to the person who has paid GST.

In that view. of the Matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, in as much as keeping in mind the language used in (1999) 2 SCC 361 (supra), the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.*

17(5)(e)	goods or services or both on which tax has been paid under section 10;
17(5)(f)	<u>goods or services or both received by a non-resident taxable person except on goods imported by him;</u>
17(5)(g)	goods or services or both used for <u>personal consumption</u> ;
17(5)(h)	<u>goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and</u>
17(5)(i)	any tax paid in accordance with the provisions of sections 74, 129 and 130.
17(6)	<p>The Government may prescribe the manner in which the credit referred to in sub-sections (1) and (2) may be attributed.</p> <p><i>Explanation.— For the purposes of this Chapter and Chapter VI, the expression “plant and machinery” means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-</i></p> <ul style="list-style-type: none"> (i) land, building or any other civil structures; (ii) telecommunication towers; and (iii) pipelines laid outside the factory premises.

Lost – When goods are missing, not traceable or inexplicable absence. **Word 'lost' is not to be confused with 'loss'.**

Loss is explicable but nevertheless a 'loss' but certainly not 'lost'. Explicable loss is in-process loss which may be normal or abnormal loss. Explicable losses do not attract reversal of credit under this clause (h) because the 'credit condition' accepted and agreed at the time of taking credit was that the said goods WILL BE USED. And when explicable in-process (normal or abnormal) loss occurs, the fact that they said goods have been used is undeniable albeit inefficiently for failing to generate produce output.

Lost, on the other hand, is a clear indication due to the inexplicable nature of this situation that the said goods ARE NOT USED as accepted and agreed. As such, 'lost' attracts reversal of credit but not 'loss'.

What shall be the case where the certain goods are purchased and distributed as gifts on Diwali etc.

The Honorable Supreme Court cited the definition of 'gift' from Corpus Juris Secundum, Volume 38 in the case of ***Sonia Bhatia v. State of UP*** [1981] 2 SCC 585) as follows:

*"A 'gift' is commonly defined as a **voluntary transfer of property** by one to another, without any consideration or compensation therefor. A 'gift' is a **gratuity and an act of generosity** and does not require a consideration, but there can be none; if there is a consideration for the transaction, it is not a gift."*

What would constitute Plant & Machinery u/s 17(5)

- ***Atriwal Amusement Park [2020] 117 taxmann.com 978 (AAR – MADHYA PRADESH)***
- **Eligibility of ITC in case of Input Tax paid on Purchase of Water Slides-**
 - *Eligible-Water Slides shall fall within the meaning of the term apparatus, equipment and machinery and therefore, shall be eligible for claim of ITC.*
- **Steel and Civil Structure on which the Water Slides are installed-**
 - *Eligible-Foundation and support structures which are used to fasten plant and/or machinery to the Earth is classifiable as 'Plant and/or Machinery'.*
- **Machines installed for Wave Pool-**
 - *Eligible-The foundation for these machines are eligible to be part of the Machines and the ITC shall be treated in a manner similar to that of the Machines.*

- **Machine Room for Machines installed for wave pool-**
 - *Not Eligible- Machine Room, which is a civil structure, erected for protecting machine is neither foundation nor civil structure for machine therefore, it is not related to the construction of the room for housing the machine shall not be eligible for ITC.*
- **Input Tax on Goods and services used for area development and preparation of land on which water slides are placed-**
 - *Not Eligible- Area development and expenditure on preparation of land like site formation services are part of the cost of the land*
- **Input Tax Credit on Goods and Services used for construction of swimming pools/Wave Pool in which the water slides directly run into-**
 - *Not Eligible-Swimming Pools/Wave Pools are not support structure or foundation for a plant, but are independent items per se.*
- **Provision of facilities like transformers, sewage treatment plant, Electrical Wiring and Fixtures. Surveillance systems, D.G. Sets, Lifts, Air Handling Units etc-**
 - *These are sine qua non for a commercial mall and hence cannot be considered separate from the building or civil structure and hence blocked.*

Special situations under ITC due to lockdown

- **Insurance premium paid in respect of health insurance of employees (DMA & EA)**
 - MHA guidelines for present period Vs Future period (No. 40 MHA guidelines dt.15th April 2020)
 - Health Insurance Vs Medical Insurance Vs Life Insurance
 - Insurance in personal name of employee Vs Company's name
 - Workers Vs Employee
 - Period of Insurance commencing prior COVID & amount paid prior to above date)
- **Goods Destroyed lying in shop/godown during lockdown.**
- **Goods sold at less than normal price after unlocking due to damage/deterioration/stock clearance.**
- **Goods bought before 31st March but delivered after that.**
- **Hand sanitizers/PPE kits/Gloves bought for employees used within /outside business premises**

AVAILABILITY OF CREDIT IN SPECIAL CIRCUMSTANCES



Claim ITC Under Special Cases

The graphic features a dark grey background with faint, light-colored floral patterns. In the top-left corner, there is a green square icon containing a yellow Indian Rupee symbol (₹). In the bottom-right corner, there is a yellow circular icon containing a green Indian Rupee symbol (₹), with a hand holding it from below. The central text 'Claim ITC Under Special Cases' is written in a bold, white, sans-serif font.

Credit of Stocks – on the date of Registration

- Section 18 (1) and (2)

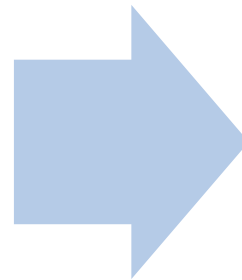
(1) Subject to such conditions and restrictions as may be prescribed—

- (a) a person who **has applied for registration** under this Act **within thirty days from the date on which he becomes liable to registration** and has been granted such registration shall be **entitled to take credit of input tax** in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock **on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of this Act**
- (b) a person who takes **registration under sub-section (3) of section 25 (Voluntary Registration)** shall be **entitled to take credit of input tax** in respect of inputs held in stock and inputs contained in semi finished or finished goods held in stock **on the day immediately preceding the date of grant of registration;**

- c) where any registered person ceases to pay tax under section 10
- he shall be entitled to take credit of input tax in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods **on the day immediately preceding the date from which he becomes liable to pay tax under section 9**: Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed; he shall be entitled to take credit of input tax in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the day immediately preceding the date from which he becomes liable to pay tax under section 9:
- Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed;

- d) where an exempt supply of goods or services or both by a registered person becomes a taxable supply, such person shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock relatable to such exempt supply and on capital goods exclusively used for such exempt supply **on the day immediately preceding the date from which such supply becomes taxable**: Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed
- 2) A registered person shall not be entitled to take input tax credit under subsection (1) in respect of any supply of goods or services or both to him after the **expiry of one year from the date of issue of tax invoice** relating to such supply.

Person Entitle to take credit



Within one year from the date of Invoice

Transfer of Credit – Sale, Amalgamation, Merger, Demerger etc.

- **Section 18(3)**

- Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilized in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

SECTION 18(4) READ WITH RULE 44 : REVERSAL OF ITC ON SWITCHING TO COMPOSITION LEVY OR EXIT FOR TAX-PAYING STATUS

- In case

- Option availed for tax payment u/s 10 after availing ITC
- Goods/Services become exempt

Amount need to be paid

by Debit of Electronic Cash/ Credit Ledger

- for ITC in respect of

- ✓ Inputs held in stock,
- ✓ Inputs contained in semi finished or finished goods held in stock
- ✓ Capital goods

shall be calculated proportionately on the basis of the corresponding invoices on which credit had been availed by the registered taxable person on such inputs;

Immediately preceding the date of exercising option/exemption. In case of capital goods ITC reduced by 5% per quarter taking life as 5 years. Such details will be furnished in GST ITC03 and shall be shall be duly certified by CA /CMA

Provided that after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

Section 18(6) read with rule 40(2) & rule 44(6) - Amount payable on supply of capital goods or plant and machinery on which ITC has been taken

- If capital goods or plant and machinery on which ITC has been taken are supplied outward by the registered person, he must pay an amount that is the higher of the following:
 - ✓ ITC taken on such goods reduced by 5% per quarter of a year or part thereof from the date of issue of invoice for such goods [i. e., ITC pertaining to remaining useful life of the capital goods (in quarters)], or
 - ✓ tax on transaction value

ITC pertaining to remaining useful life of the capital goods should be computed separately for ITC of CGST, SGST/UTGST and IGST.

- Where the amount so determined exceeds the tax payable on the transaction value of the capital goods, such amount need to be paid and thus, should be added to the output tax liability.
- If refractory bricks, moulds and dies, jigs and fixtures are supplied as scrap, the taxable person may pay tax on the transaction value.

*Note: Under rule 44(6), ITC involved in the remaining useful life (in months) of the capital goods is reversed on pro rata basis, taking the useful life as 5 years.

Circular 96/14/2019 Dated 28-03-2019 Seeks to clarify issues in respect of transfer of input tax credit in case of death of sole proprietor

Issue:

- Clarifications have been sought w.r.t.
 - ✓ Eligibility to transfer the credit and
 - ✓ The procedure in case of death of a sole proprietor

Process:

- New registration – Transferee / successor should get registered w.e.f. date of transfer
- Cancellation of old registration – Legal heirs should apply for the cancellation in Form Reg-16
- In both the cases, mention the reason as “death of sole proprietor”.
- File ITC-02 in the registration required to be cancelled, before cancellation
- Accept the ITC-02 in the new GSTIN.

Clarification:

- The credit transfer shall be eligible. The transferee / successor shall be liable to pay any tax, interest or any penalty due from the transferor in cases of transfer of business due to death of sole proprietor..
- Transfer/change in ownership referred in Sec 18(3), 22(3), 29(1)(a) and 85(1) of the CGST act, includes the transfer or change in the ownership of business due to death of the sole proprietor.

Clause (b) of Section 9 of CGST Amendment Act, 2018 replaces clause (b) of Section 17(5) to bring out the following amendments bring out the following amendments:

1. Credit shall not be available for the supply of food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) of Section 17(5) except when used for the purposes specified therein. In other words, renting or hiring of motor vehicles, vessels and aircraft are blocked only if the purchase of such motor vehicles, vehicles and aircrafts are blocked as per clause (a) of (aa). However, input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply.
2. Further, credit in respect of life insurance and health insurance will continue to be blocked.
3. ITC on membership of club, health and fitness centre will also be considered as blocked
4. Further, travel benefits extended to employees on vacation such as leave or home travel concession will also not be available.
5. The provisions have been amended so as to allow ITC in respect of goods or services or both specified above if it is made obligatory for an employer to provide such services under any law for the time being in force.
6. In all the above cases, the credit will be available if the goods or services are required to be provided by the employer through any obligation imposed under any law
7. Where steps are taken to include these inward supplies as an 'element' of an outward supply, then credit cannot be denied.

Blocking of Credit Ledger

“86A. Conditions of use of amount available in electronic credit ledger.-

(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.”.

- The manner in which Rule 86A has been drafted, the concept of notice and showing cause has been done away with. This is in gross violation of principles of natural justice. The rationale provided in the rule is squarely invalid and the recovery proceedings cannot be initiated prior to following the principles of natural justice. Case laws in this regard are ***The Union of India vs Mrs. Prashanthi (Kar), Dabur India Ltd. v. State of Uttar Pradesh — 1990 (49) E.L.T. 3 (S.C.), Godavari Commodities Ltd VS UOI 2019-TIOL-2818-HC-JHARKHAND-GST.***
- Moreover, the generally accepted principles of the law are that “Rules cannot override the Act” and rule cannot operate independently, it has to be read along with the Act. However, in relation to rule 86A, none of the provisions of the Act provides the power for such rule. In case of ***Intercontinental Consultants and Technocrats Private Limited v. Union of India 2018(10) G.S.T.L 401 (S.C)*** it was held that – rules cannot go beyond the statute, in case of conflict with the main enactment, the rule has to give way. Further, rules are framed for achieving the purpose behind the statute.
- Once the credit entitled to be taken as per section 16 of CGST Act, 2017 has been availed becomes an indefeasible right of the registered person. The department does not have built in powers / authority to stop a registered person from availing and utilising the credit under the law. However, they may recover, deny the refund of availment of ineligible credit through the proceedings prescribed under the law.

- The language used in rule 86A can lead to interpretational disputes. For instances, a. In reference to words **reason to believe** or **reasons recorded in writing** there several settled cases under Income Tax Act to infer the actual meaning. The belief should be in a good faith, it can't be a pretence, further the reasons to make such belief should be objective i.e. there should be proper evidences with the officer to believe stronger than the satisfaction. There should a written evidence in the internal files. Also the reasons recorded in writing in not sufficient in itself, hey should also be communicated to the assessee'
- In reference to the word Fraud – the intention to evade tax is built in the word. Further a positive act with the intention to evade the tax has to be - ***Cosmic Dye Chemicals vs. CCE, Bombay 1995 (75) ELT 721 (SC), CCE v Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC)***

ISD v. Cross Charge

The advance ruling order passed in the case of Columbia Asia Hospitals Private Limited **KAR/AAR-15/2018 dated 27-07-2018** which was also upheld by appellate authority of advance ruling that

“The appellate authority for advance ruling upheld the rulings passed under section 98(4) of the GST Act 2017 vide NO.KAR ADRG 15/2018 dated 27/07/2018 i.e. wherein the activities performed by the Employees at IMO providing the services in the course of or in relation to employment such as accounting, administrative and IT system management to their distinct units located at other state is treated as taxable supply as per entry 2 of schedule I appended to Act, read with section 7 of the CGST Act 2017.”

This is where the concept of Cross-Charge first came into existence.

In a cross-charge mechanism, expenses incurred by a distinct person for the purpose of carrying out activities the outcome of which benefits other distinct persons is required to be cross charged. **It involves an element of service b/w distinct persons.**

For e.g. Salary is paid to top level management situated in one state i.e. at HO for decisions taken for both HO as well as branches; or

Centralized accounting system is followed by an organization where accounting of transactions at Branch Level is recorded by HO at their end.

There comes an element of supply of service as HO is providing for the expenses which are incurred for the purpose of branch or in a way is providing management, accounting services, as the case may be, to its branch.

HO though may not actually charge something from branch in this case, but the transaction itself falls in the ambit of Schedule I i.e. supply between distinct person and in pursuance of same may be subject to GST.

Value in such cases will have to be determined on the basis of section 15 of the act and rules made thereunder.

ISD i.e. Input Service Distributer on the other hand has been defined in the act itself.

*2 (61) "Input Service Distributor" means an office of the supplier of goods or services or both **which receives tax invoices** issued under section 31 towards the receipt of input services and **issues a prescribed document for the purposes of distributing** the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;*

ISD for the purpose of law is that office of supplier which actually does not receive any supplies but only receives invoices in its name in respect of services received by some other office of same person. Tax so charged in respect of such invoice is then transferred to respective office/Branch by way of issue of prescribed document. **There is no element of service provided, only distribution of credit is undertaken.**

Formation of ISD is for distribution of *Input tax credit on common input services* whose invoice has been raised to such ISD. Input tax credits of goods are not eligible for distribution.

Example: X Ltd, of Mumbai, hires an HR consultancy firm for its branches at Kolkata, Delhi, and Patna.

Now two scenarios are possible i.e. either the invoices can be raised directly to respective branches in respect of services received at each Branch and accordingly payment from each branch can be made.

Alternatively, X Limited can get the invoice issued in the name of Mumbai HO only, however, since the services were not actually received by Mumbai office, credit cannot be availed at Mumbai.

In such a case Mumbai Office is required to obtain registration in Mumbai as ISD and can get the invoice issued in the name of Mumbai (ISD) Branch only and can itself distribute such credit to the respective branches based on services utilized at each state.

It is important to understand that the purpose and intent behind the two concepts i.e. Cross Charge and ISD is completely different.

Cross Charge involves the element of supply between distinct persons for which invoice is to be issued on distinct person.

ISD on the other hand does not involve any element of supply and merely distribution of ITC is undertaken.

The two concepts being entirely different provides for two different situations altogether and cannot be used interchangeably.

Important issues related to ITC

- CGST and SGST of other states cannot be claimed as Input Tax Credit.
- Held in the Case : Storm Communications (P.) Ltd. [2019] 101 taxmann.com 479 (AAR-WEST BENGAL)
- “As input tax and its credit are always linked with whether the person is registered or not, the two components of GST paid on inward intra-state supply in Tamil Nadu could have been taken credit of, if only registration is taken in Tamil Nadu under Section 25(1) of the GST Act and is regarded as "distinct person" within the meaning of Section 25(4) of the GST Act. The architecture of the GST Act is such that even if a person is registered in different states all such registrations will be treated as distinct persons, and input tax in the credit ledger of one such person is not transferable to the credit ledger of another. If the person is not registered in a particular state, the tax paid on the inward supplies in that state is not 'input tax' in relation to the said person.

Non Payment by Supplier – Whether ITC Disallowed:

- Arise India (Delhi HC)
- Quest Merchandising India Pvt. Ltd and Ors
- *Relevant para: “53. In light of the above legal position, the Court hereby holds that the expression „dealer or class of dealers“ occurring in Section 9 (2) (g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bona fide entered into purchase transactions with validly registered selling dealers who have issued tax invoices in accordance with Section 50 of the Act where there is no mismatch of the transactions in Annexure 2A and 2B.”*

Blocked ITC : What about normal process and other transit losses?

- Sec 17(5)(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples“
- [CCE–v. BOC \(India\) Ltd. \[2007\] 2007 taxmann.com 849 \(Delhi\)](#)
- There is a clear distinction between waste, refuse or by product arising during the manufacture of the final product. The loss of nitrogen/liquid argon due to evaporation cannot be considered as waste or refuse or even a by-product arising during the manufacture of the final product. Evaporation is a natural consequence of the manufacturing activity carried out by the Assessee. Therefore, the provisions of Rule 57 D of the Central Excise Rules, 1944 would not apply

Sales Promotion Scheme

- ITC shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration.
- 'Buy One, Get One free' is to be treated as supplying two goods for the price of one and thus, ITC shall be available.
- Discounts offered by the suppliers shall be excluded provided satisfy the parameters laid down in section 15(3), including the reversal of similar amount of ITC by the recipient of the supply. [Circular No. 92/11/2019-GST dated 7.3.2019]

Issues surrounding gifts -

- Relevant AAR's:
- Gold coins given to dealers on the meeting of certain specified targets – treated as gift from the applicant to the dealers (2019-VIL-60-AAR)
- Foreign / local trips, provided as incentives, to the dealers / painters etc. – Treated as free supply and credit of input services not available (2019-VIL-308-AAR)
- Expenses incurred towards promotional schemes of Loyalty Program or goods given as brand reminders -Treated as gift (2019-VIL-176-AAR)

Whether CSR is a free supply?

- AAR -CSR activity of supplying items for flood relief victims –Free supplies by the applicant(2019-VIL-100-AAR)

*Thank
you*

