

## **HC issued notice in writ challenging Rule 36(4) of the CGST Rules restricting ITC availment**

The Hon'ble Gujarat High Court, in *M/s Surat Mercantile Association v. Union of India [R/Special Civil Application No. 13289 of 2020 with Civil Application No. 1 of 2020 in R/Special Civil Application No. 13289 of 2020, decided on December 18, 2020]* issued notice to the revenue department with respect to the writ challenging constitutional validity of Rule 36(4) of the Central Goods and Services Tax Rules, 2017 ("**CGST Rules**").

### **Facts:**

Surat Mercantile Association ("**the Petitioner**") in this writ petition seek to challenge the validity of sub-rule (4) of the Rule 36 of the CGST Rules on the ground that, the same is arbitrary, irrational and therefore, violative of Article 14 of the Constitution of India.

The Petitioner argued that Rule 36(4) of the CGST Rules speaks to restrict the Input Tax Credit ("**ITC**") to a buyer of goods and services on the basis of the details of the outward supply furnished by the supplier of the goods and services or on the basis of the common portal. Further, the same is unconstitutional being contrary to the scheme of the Central Goods and Services Tax Act, 2017 ("**CGST Act**"). Furthermore, Rule 36(4) of the CGST Rules puts an onerous and impossible burden on the buyer of the goods and service to ensure that the supplier of goods and services does in fact upload the details of the outward supplier on the common portal and if the supplier fails to do so, the buyer has to face the risk of the ITC being blocked or kept in suspension.

### **Issue:**

Whether the Rule 36(4) of CGST Rules is arbitrary, irrational and violative of Article 14 of the Constitution of India?

### **Held:**

The Hon'ble Gujarat High Court, in *R/Special Civil Application No. 13289 of 2020 with Civil Application No. 1 of 2020 in R/Special Civil Application No. 13289 of 2020 on December 18, 2020* issued a notice to the revenue department, returnable on February 12, 2021 (now listed for hearing on April 23, 2021), be served by email over and above the regular service through the Court.

### **Comments:**

Similar writ petitions have been filed which are pending before the Hon'ble Rajasthan High Court in *Gr Infraprojects Limited v. Union of India* [D.B. Civil Writ Petition No. 6337/2020 dated August 05, 2020], before the Hon'ble Calcutta High Court in *M/s. LGW Industries Limited & anr. v. Union of India & ors.* [W.P.A. 92 of 2020, dated December 14, 2020] and before the Hon'ble Gujarat High Court in *M/s Society for Tax Analysis And Research v. Union of India* [R/Special Civil Application No. 19529 of 2019, dated, November 14, 2019] wherein the Court has issued notice to government, in case of Rule 36(4) of the CGST Rules, which places a restriction on availment of ITC @20%/10%/5% (as amended from time to time) over and above amount reflected in GSTR 2A, despite having valid tax invoice.

It is to be noted that, the condition imposed by Rule 36(4) of the CGST Rules is not under the control of the recipient and hence can be said to be a condition which is impossible to be fulfilled by the recipient and thereby not requiring compliance.

Further, capping of provisional ITC brings an incumbent task of regularly matching ITC details of taxpayers with those appearing in his GSTR-2A. Furthermore, any gaps may have to be resolved with constant follow-ups with the suppliers. Also, it is likely to impact the working capital for many dealers.

Furthermore, amendment has been proposed vide Clause No. 100 of the Finance Bill, 2021 to insert the new clause '(aa)', after clause (a), in Section 16(2) of the CGST Act, that provides an additional requirement to claim ITC based on GSTR-2A and newly introduced GSTR-2B, i.e., ITC on invoice or debit note can be availed only when details of such invoice/debit note have been furnished by the supplier in the statement of outward supplies (GSTR-1) and such details have been communicated to the recipient of such invoice or debit note.

This amendment has been proposed to avoid the unnecessary litigation and writ petitions challenging the validity of Rule 36(4) of the CGST Rules (as seen above).

To know more, kindly watch **“Any Relevance of GSTR 2A/ 2B or Rule 36(4) for availing GST Credit - Budget 2021”** by CA Bimal Jain-  
<https://www.youtube.com/watch?v=dMeAOCsRKew&t=226s>

### **Relevant Provisions:**

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**Rule 36(4) of the CGST Rules:**

*“Documentary requirements and conditions for claiming input tax credit-*

*(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been furnished by the suppliers under sub-section (1) of section 37 in FORM GSTR-1 or using the invoice furnishing facility, shall not exceed 5 per cent of the eligible credit available in respect of invoices or debit notes the details of which have been furnished by the suppliers under sub-section (1) of section 37 in FORM GSTR-1 or using the invoice furnishing facility”*

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