

**BURNING ISSUES PERTAINING  
TO SECTION 50, SECTION 16(4),  
RULE 36(4) AND RULE 86A**

**Abhay Desai**

**B. Com., C.A., L.L.B., D.I.S.A.**

**INTEREST**

# LEGAL PROVISION

- SECTION 50. Interest on delayed payment of tax. —
  - (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

# PROVISO INSERTED BUT NOT NOTIFIED YET

- 39<sup>th</sup> GST Council Meeting
  - Interest for delay in payment of GST to be charged on the net cash tax liability w.e.f. 01.07.2017 (Law to be amended retrospectively).
- Proviso to Sec. 50(1)
  - Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.

# Poser - 1

- Baffled Ltd. has reflected the output tax liability of INR 1 crore as well as ITC availed/utilized of INR 0.8 crore in the books of accounts for the month of December, 2019. It has also filed GSTR – 1 within the due date reflecting the said output tax. However payment of the tax by way of cash (after adjusting the ITC) of INR 0.2 crore could not be done within the due date of filing GSTR – 3B and therefore GSTR – 3B also could not be filed on the due date. Payment was done with a delay of 10 days and GSTR – 3B was also filed on the date of payment after debiting the balance available in the electronic credit/cash ledger. Please examine whether the interest liability u/s 50 would be on the gross amount of output tax or only on the net amount of the output tax payable in cash ?

# CONTENTIONS

- Collector of Excise v. Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.).
  - 18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India [1999 (106) E.L.T. 3] this Court said that a credit under the Modvat scheme was “as good as tax paid.”
- Pratibha Processors v. Union of India 1996 (88) E.L.T. 12 (S.C.)
  - Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty — which is penal in character.

# CONTENTIONS

- CAG Report for 17 – 18 (page no. 26)
  - IGST, a levy on inter-state supplies and import / export of goods and services, is levied and collected by the Government of India and apportioned between the Union and the States as prescribed in the IGST Act. **IGST is initially collected under Major Head 0008 in Consolidated Fund of India** and then once taxpayer uses this as ITC to pay CGST / SGST / UTGST on further supply (here in after referred to as ITC cross utilisation), **the amount is transferred from IGST to relevant head of account viz. CGST / UTGST under CFI or to SGST head of State Government concerned.** Also, when ITC of IGST is rendered ineligible for further utilisation for any reason or gets lapsed (breaking the ITC chain), the same shall be apportioned between the Union and the States. The ITC Cross utilisation and apportionment amounts are arrived at every month using an algorithm that runs on GST portal based on returns filed.

# CONTENTIONS

- Article 266. Consolidated Funds and public accounts of India and of the States
  - (1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, **all revenues received by the Government of India**, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans **shall form one consolidated fund to be entitled the Consolidated Fund of India**, and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled the **Consolidated Fund of the State**



# CONTENTIONS

- Hingir Rampur Coal Company v. State of Orissa, AIR 1961 SC 459;
- Govt. of Madras v. Zenith Lamps & Electricals Ltd. AIR 1973 SC 724;
- State of Rajasthan v. Sajjan Lal, AIR 1975 SC 706
- Southern Pharmaceuticals & Chemicals v. State of Kerala, AIR 1981 SC 1863

# CONTENTIONS

- 31st GST Council Meeting held on 22.12.2018
  - “Hence, by this mechanism the registered person effectively pays tax only on the value addition made by him. If this concept is applied for interest payable, then, it appears that the interest should also be charged on the tax payable on the value addition only, i.e. the amount of tax which is required to be paid through electronic cash ledger.”
- Hence proviso to be read as clarificatory.

# CONTENTIONS

- GST Council at their 31st meeting
  - “A perusal of above provisions indicate that the law permits furnishing of a return without payment of full tax as self-assessed as per the said return but the said return would be regarded as an invalid return. The said return, however, would not be used for the purposes of matching of ITC and settlement of funds. Thus, although the law permits part payment of tax but no such facility has been yet made available on the common portal. This being the case, a registered person cannot even avail his eligible ITC as he cannot furnish his return unless he is in a position to deposit his entire tax liability as self- assessed by him. This inflexibility of the system increases the interest burden.”
  - “It may be seen from the above that if the facility for part payment, as permitted under law, was available, the registered person would have been required to pay interest only on Rs. 10/- but presently he is liable for interest on entire tax liability of Rs. 100/-.”

# CONTENTIONS

- Vision Distribution Pvt. Ltd. v. Commissioner W.P.(C) 8317/2019 (Del.)
  - The tax payer cannot be made to suffer on account of failure of the Government in devising smooth GST systems).

# CONTENTIONS

- Sec. 50(1) seeks imposition of interest by way of self-assessment on failure of pay the tax “or any part thereof”.
- Sec. 50 (2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.
  - The word “prescribed” has been defined u/s 2(87) of the CGST Act, 2017 to mean prescribed by rules made under the Act on the recommendation of the Council.

# CONTENTIONS

- Notification No. 23/2017 – Central Tax dated 17.08.2017
- Explanation.- For the purposes of this notification, the expression-
  - (ii) “tax payable under the said Act” means the **difference** between the tax payable for the month of July, 2017 as detailed in the return furnished in FORM GSTR-3B and the **amount of input tax credit entitled to for the month of July, 2017** under Chapter V and section 140 of the said Act read with the rules made thereunder.

# CASE LAW

- Refex Industries Limited v. The Assistant Commissioner of CGST & Central Excise (Writ Petition Nos.23360 and 23361 of 2019)
  - *"12. The specific question for resolution before me is as to whether in a case such as the present, where credit is due to an assessee, payment by way of adjustment can still be termed 'belated' or 'delayed'. The use of the word 'delayed' connotes a situation of deprivation, where the State has been deprived of the funds representing tax component till such time the Return is filed accompanied by the remittance of tax. The availability of ITC runs counter to this, as it connotes the enrichment of the State, to this extent. Thus, Section 50 which is specifically intended to apply to a state of deprivation cannot apply in a situation where the State is possessed of sufficient funds to the credit of the assessee. In my considered view, the proper application of Section 50 is one where interest is levied on a belated cash payment but not on ITC available all the while with the Department to the credit of the assessee. The latter being available with the Department is, in my view, neither belated nor delayed."*

# REFUND

- Sec. 54(1)
  - Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed :
- Sec. 54(4)
  - (b) such documentary or other evidence (including the documents referred to in section 33) as the applicant may furnish to establish that the amount of tax and interest, if any, paid on such tax or any other amount paid in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such tax and interest had not been passed on to any other person :



# REFUND

- Sec. 54(8)
  - Notwithstanding anything contained in sub-section (5), the refundable amount shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to —
    - (e) the tax and interest, if any, or any other amount paid by the applicant, if he had not passed on the incidence of such tax and interest to any other person; or
- Explanation. — For the purposes of this section, —
  - (h) in any other case, the date of payment of tax.

# REFUND

- COMMISSIONER OF C. EX., DELHI-III Versus NORTHERN MINERALS LTD. 2007 (216) E.L.T. 198 (P & H)
  - 11. In the present case, it is undisputed that the rate of interest leviable on the respondent-assessee was 15% as was reduced by notification dated 13-5-2002, issued under Section 11AA and Section 11AB of the Act. However, the respondent-assessee had paid interest @ 24% per annum erroneously and an amount of Rs. 1,20,809/- has been ordered to be refunded. We find no reason to exclude the payment of interest from the provisions of Section 11B of the Act merely because it uses the expression 'refund of duty' because delayed payment of duty itself attract the payment of interest which is inextricably associated with duty. **Moreover, such a collection of interest on account of delayed payment of duty would be unauthorised imposition of tax which is impermissible by the provisions of Article 265 of the Constitution.** There is, thus, no merit in this appeal.

# REFUND

- Further support:
  - 2009 (246) ELT 782 (Commissioner (Appeals))
  - 2009 (248) ELT 821 (Tribunal Madras/Chennai)
  - 2011 (22) STR 197 (Tribunal Bombay/Mumbai)
  - 2013 (289) ELT 395 (Tribunal Ahmedabad)
  - 2015 (317) ELT 405 (Bombay High Court)
  - 2019 (370) ELT 557 (Tribunal Bombay/Mumbai)
  - 2019 (370) ELT 780 (Tribunal Chandigarh)

## Poser - 2

- What would be the interest liability u/s 50 in the above set of facts except the fact that in the new scenario even GSTR – 1 was filed belatedly along with GSTR – 3B ?

# CONTENTIONS

- SECTION 37. Furnishing details of outward supplies. —
  - (1) Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 or section 51 or section 52, shall furnish, electronically, in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected during a tax period on or before the tenth day of the month succeeding the said tax period and such details shall be communicated to the recipient of the said supplies within such time and in such manner as may be prescribed

# Poser - 3

- In the above two scenarios, what would be the interest implications u/s 50 if Baffled Ltd. had made the deposit of the tax payable in cash of INR 0.2 crore in the Electronic Cash Ledger within the due date but could debit the same only at the time of the delayed filing of the GSTR – 3B ?

# CONTENTIONS

- SECTION 50. Interest on delayed payment of tax. —
  - (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

# CONTENTIONS

- **SECTION 49. Payment of tax, interest, penalty and other amounts.**
  - (1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.
- **Rule 87**
- **Ecl – Appropriation account into various heads**



# Poser - 4

- Departmental audit has been conducted of Baffled Ltd. for FY 2017-18 and it has been found that certain output tax liability of INR 0.4 crore has not been admitted in the return and has not been paid till date. Baffled Ltd. however carries sufficient balance in the electronic credit ledger right from the relevant time of supply with respect to the incremental liability. In the said context please examine the liability to pay the interest, if any ?

# CONTENTIONS

- Same as that for earlier posers – there is no failure to pay

# Poser - 5

- Baffled Ltd. inadvertently omitted reflecting the output tax liability of INR 1 crore as well as ITC of INR 1 crore for the month of March, 2019 in GSTR – 1 as well as GSTR – 3B. However the said output tax liability and ITC has been duly reflected in the books of accounts. It was only in the month of December, 2019 that the same were reflected. In the said context please examine the liability to pay the interest, if any ?

# CONTENTIONS

- Same as that for earlier posers – there is no failure to pay

# Poser - 6

- Baffled Ltd. has availed transitional credits of INR 2 crores which are subsequently found to be ineligible by the departmental authorities. Baffled Ltd. has utilized the said transitional credits from time to time for paying the output tax. Please examine the interest implications in such scenario ? Would the answer change if Baffled Ltd. has maintained minimum balance equal to the ineligible amount in their electronic credit ledger from the date of taking the said ineligible credits till today ?

# CONTENTIONS

- Sec. 50(1) to apply if such ineligible transitional credits have been utilized to pay the tax.
- Sec. 50(3) cannot apply as it is only with respect to “input tax credits”
- Rule 121 Recovery of credit wrongly availed.
  - The amount credited under sub-rule (3) of rule 117 may be verified and proceedings under section 73 or, as the case may be, section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly.
- Whether proceedings u/s 73 or 74 can be initiated ?
  - Rule 121 formulated by exercising the powers granted by Sec. 164 of the CGST Act, 2017 – “for carrying out the provisions of this Act”
  - General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav 1988 AIR 876 (SC)

# Poser - 7

- Baffled Ltd. has availed input tax credit of INR 5 crores on supply of works contract services for construction of a building which is meant for self-use. Said input tax credits have been utilized from time to time for paying the output tax. Subsequently it has been found that the said input tax credits were not eligible considering the provisions of Sec. 17(5) of the CGST Act, 2017. Please examine the interest implications in such scenario ? Would the answer change if Baffled Ltd. has maintained minimum balance equal to the ineligible amount in their electronic credit ledger from the date of taking the said ineligible credits till today ?

# CONTENTIONS

- Sec. 50(3)
  - A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.
- “Undue or excess”
  - ITC due under GSTR – 1, 2 & 3 only after matching. Till then ITC is provisional (see Sec. 41)
- Sec. 50(1) to apply on account of failure to pay the tax if such ineligible ITC has been utilized.



# Poser - 8

- Baffled Ltd. has availed input tax credits of INR 0.5 crores during FY 2017-18 on certain transactions which are not reflected in GSTR – 2A. Also the time limit to amend GSTR – 1 has expired. In such scenario whether there can be any interest implications if Baffled Ltd. agrees to reverse the said input tax credits to avoid litigation ?

# CONTENTIONS

- Sec. 50(3) not to apply due to suspension of mechanism of matching as contained u/s 42 & 43.

**SEC. 16(4)**

# Poser - 1

- Hapless Ltd. had availed ITC of INR 1 crores in the books of accounts for FY 2018-19 but did not reflect the same in GSTR – 3B filed till 20.10.2019. Hence the said ITC has not been credited in the electronic credit ledger till the given date. It was only while filing GSTR – 3B for the month of February, 2020 that Hapless Ltd. could reflect the said ITC and get the same credited in the electronic credit ledger. Now it has received notice from the department seeking to reverse the said credit on the alleged premise that the same has been taken in violation of the provisions contained u/s 16(4). Please guide Hapless Ltd. as to what it should do in such scenario ?

# CONTENTIONS

- Sec. 14

- (4) 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

# CONTENTIONS

- SECTION 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.

# CONTENTIONS

- Rule 36(2)
  - Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document, and the relevant information, as contained in the said document, is furnished in **FORM GSTR-2\*** by such person

# CONTENTIONS

- SECTION 38. Furnishing details of inward supplies. —
  - (1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52, shall verify, validate, modify or delete, if required, the details relating to outward supplies and credit or debit notes communicated under sub-section (1) of section 37 to prepare the details of his inward supplies and credit or debit notes and may include therein, the details of inward supplies and credit or debit notes received by him in respect of such supplies that have not been declared by the supplier under sub-section (1) of section 37.



# CONTENTIONS

- SECTION 35. Accounts and other records. —
  - (1) Every registered person shall keep and maintain, at his principal place of business, as mentioned in the certificate of registration, a true and correct account of —
    - (d) input tax credit availed;
    - (e) output tax payable and paid; and

# CONTENTIONS

- Sec. 41(1)
  - Every registered person shall subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.

# CONTENTIONS

- Sec. 39(1)
  - Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed

# CONTENTIONS

- Rule 61
  - (1) Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return specified under sub-section (1) of section 39 in **FORM GSTR-3\*** electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.
  - (2) **Part A** of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through **FORM GSTR-1\***, **FORM GSTR-2\*** and based on other liabilities of preceding tax periods.

# CONTENTIONS

- Sec. 42(1) The details of every inward supply furnished by a registered person (hereafter in this section referred to as the “recipient”) for a tax period shall, in such manner and within such time as may be prescribed, be matched —
  - (a) with the corresponding details of outward supply furnished by the corresponding registered person (hereafter in this section referred to as the “supplier”) in his valid return for the same tax period or any preceding tax period;
  - (b) with the integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of goods imported by him; and
  - (c) for duplication of claims of input tax credit.

# CONTENTIONS

- Sec. 42(2)
  - The claim of input tax credit in respect of invoices or debit notes relating to inward supply that match with the details of corresponding outward supply or with the integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of goods imported by him shall be finally accepted and such acceptance shall be communicated, in such manner as may be prescribed, to the recipient.

# CONTENTIONS

- (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.
  - (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; and
  - (d) he has furnished the return under section 39 :

# CONTENTIONS

## Taking the ITC

- In the records maintained u/s 35(1)
- After satisfying (i) the conditions u/s 16(2) (except (c) and (d)) and (ii) reflecting the transaction in GSTR – 2 (Rule 36)

## Credit in the Ecr1

- Credited on provisional basis upon filing GSTR – 3 (Sec. 39 & 41) auto-drafted from GSTR – 2.

## Final acceptance

- ITC finally accepted after undertaking matching u/s 42 without discrepancy or removing the same.



# CONTENTIONS

- GSTR – 3B
- 17<sup>th</sup> GST Council Meeting
- 8.6.6. In respect of the agenda item on the power to be exercised under Sections 37, 38 and 39 of the Central Goods and Services Tax Act, 2017, the Council approved the following-
  - (i) For the first two months of GST implementation, tax would be payable based on a simple return (Form GSTR-3B) **containing summary of outward and inward supplies**, to be submitted before the 20th of the succeeding month. Law Committee shall prepare the FORM GSTR-3B;

# CONTENTIONS

- Restriction u/s 16(4) qua the “taking of ITC” has to be determined with respect to the taking in the records maintained u/s 35(1).

# CONTENTIONS

- Sec. 16(2) vis-à-vis 16(4)
  - (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, —
  - (4) 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

# CONTENTIONS

- (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.
- (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; and
- (d) he has furnished the return under section 39 :

# CONTENTIONS

- “Subject to” – “conditional upon” K. R. C. S. Balakrishna Chetty & Sons v. State of Madras (1961 AIR 1152)

# CONTENTIONS

- GSTN not permitting filing return only reflecting ITC and not outward tax liability if the payment could not be made by due date.
  - Octagon Communications Pvt Limited Vs UOI 2019-TIOL-909-HC-AHM-GST (interim order).
- Broom describes the application of the principle in more detail as under: "... that ... where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over, the law will in general excuse him...."
- Hughey v. JMS Development, Justice Owens of the United States Court of Appeals
  - "Lex non cogit ad impossibilia: The law does not compel the doing of impossibilities."
- Cochin State Power & Light Corporation Ltd. v. The State of Kerala AIR 1965 SC 1688
  - "The performance of this impossible duty must be excused in accordance with the maxim, lex non cogitate ad impossible (the law does not compel the doing of impossibilities)"

# CONTENTIONS

- GSTR – 3B filed before the retrospective amendment in Rule 61 vide Notification No.49/2019 C.T dated 09.10.2019.
- Vested right created before the date of amendment cannot be taken away.
- Eicher Motors Ltd. And Anr vs Union Of India 1999 (1) SCR 295 (S.C.).
  - Thus the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The basic postulate that the Scheme is merely being altered and, therefore, does not have any retrospective or retroactive effect, submitted on behalf of the State, does not appeal to us. As pointed out by us that when on the strength of the Rules available, certain acts have been done by the parties concerned, incidents following thereto must take place in accordance with the Scheme under which the duty had been paid .....

# CONTENTIONS

- Article 300A states that - No person shall be deprived of his property save by the authority of law.
  - Procedural lapse cannot be a good reason to deprive.



# CONTENTIONS

- Reflection in GSTR – 2A

# CONTENTIONS

- GOODS AND SERVICES TAX SETTLEMENT OF FUNDS RULES, 2017
- Rule 4(iv)
  - (a) list of registered persons in a State or Union Territory who have made inter-State inward supplies on which **input tax remains unutilised** till end of September of the subsequent financial year and thus input tax credit on Integrated Tax paid is not available as per sub-section (4) of section 16 of Central Goods and Services Tax Act and State Goods and Services Tax Act and section 21 of the Union Territory Goods and Services Tax Act, and the said Integrated Tax paid is to be apportioned under section 17 of the Integrated Goods and Services Tax Act, in **FORM GST STL-01.07\***.
  - **Note** : The summary of Integrated Tax to be apportioned to State Tax or Union Territory Tax and Central Tax from this statement shall be reflected in column 8 of both **FORM GST STL 1.01\*** and **FORM GST STL 2.01\***, respectively

# CONTENTIONS

- SECTION 17. Apportionment of tax and settlement of funds. — (1) Out of the integrated tax paid to the Central Government, -
  - (c) in respect of inter-State supply of goods or services or both made in a financial year to a registered person, where he does not avail of the input tax credit within the specified period and thus remains in the integrated tax account **after expiry of the due date for furnishing of annual return for such year in which the supply was made;**
- W.e.f. 01.02.2019 via IGST (Amdt.) Act, 2018
  - (2A) The amount not apportioned under sub-section (1) and sub-section (2) may, for the time being, on the recommendations of the Council, be apportioned at the rate of fifty per cent. to the Central Government and fifty per cent. to the State Governments or the Union territories, as the case may be, **on ad hoc basis** and shall be adjusted against the amount apportioned under the said sub-sections.]

# Poser - 2

- Audit by a CA of Hapless Ltd. for FY 2018-19 was conducted and it has been noticed that it had not claimed ITC of INR 2 crores for the said period which is otherwise eligible. Even in the books of accounts the said ITC has been expensed out. Now the CA of Hapless Ltd. seeks your opinion on whether such ITC can be availed while filing GSTR – 3B for the month of March, 2020 ?

# CONTENTIONS

- Sec. 16(2) overrides 16(4)
- Once the right is vested, it cannot be restricted
- Sec. 16(4) to be read with the intent of fund settlement
- ITC reflected in 2A

# Poser - 3

- Hapless Ltd. is also confused with respect to the applicability of Sec. 16(4) pertaining to the ITC availed of the tax payable under RCM. Whether restrictions u/s 16(4) shall apply to the ITC of INR 0.5 crore availed now in the month of March, 2020 for tax paid under RCM with respect to the GTA supplies received during FY 2017-18 (GST period) ?

# CONTENTIONS

- Sec. 31(3)(f)
  - a registered person who is liable to pay tax under sub-section (3) or sub-section (4) of section 9 shall issue an invoice in respect of goods or services or both received by him from the supplier who is not registered on the date of receipt of goods or services or both
  - Recipient not considered as a supplier unlike Sec. 9(5).
- Date of self-invoice to reckoned.

# Poser - 4

- Hapless Ltd. has also received a debit note in March, 2020 from a vendor with respect to the interest charged on account of the delayed payment with respect to the invoice raised in FY 2017-18 (GST period). As GST has also been charged on the said debit note, Hapless Ltd. seeks your opinion as to whether it can avail the ITC considering that the amendment u/s 16(4) delinking the due date for availing ITC pertaining to a debit note with the date of invoice has not yet been notified.



# CONTENTIONS

- Law cannot ask a person to do the impossible.
- Sec. 16(4) to be read down.
  - Amendment to be read as retrospective since it cures a defect.

# **RULE 36(4)**

# THE RULE

- Rule 36

- (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 uploaded by the suppliers under sub-section (1) of section 37, shall not exceed [10 per cent.] 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.

# Poser - 1

- What shall be the effective date for applying the said sub-rule ?  
Whether the amended 10% restriction apply to GSTR – 3B for the month of December, 2019 ?

# CONTENTIONS

- Original inserted vide Notf no. 49/2019-CT dt. 09.10.2019
- “10 per cent” substituted for “20 per cent” with effect from 01.01.2020 vide Notf no. 75/2019 – CT dt. 26.12.2019.
- Rule applies on the date of availment.
  - It can thus be said that the 10% amendment shall not apply to GSTR – 3B filed for the month of December, 2019 as the ITC is first availed in the books and then reflected in GSTR – 3B (please refer further discussion on this aspect in the context of Sec. 16(4)). Therefore the ITC availed for December, 2019 shall be governed by 20% limit.

# Poser - 2

- For making the comparison under the new sub-rule of ITC permissible as per law vis-à-vis eligible ITC in GSTR – 2A, how shall the time dimension be relevant ? Whether the invoices reflected in GSTR – 2A in the preceding month be considered for the comparison if the ITC with respect to the said invoices have been availed in the current month ?

# CONTENTIONS

- Time dimension not contained in the Rule.
- Circular No. 123/42/2019 – GST dt. 11.11.2019
  - Calculation would be on consolidated basis for the given tax period.
- It however brings the time dimension by allowing the restricted ITC only on proportionate reflection of the missed invoices.
- Hence we can say that the Rule read with the Circular seeks transaction-wise matching with tolerance limit of 10%. Therefore the invoice reflected in the previous tax periods needs to be factored while determining the ITC restricted, if any.

# Poser - 3

- How to compute “eligible” ITC as per GSTR – 2A ? Whether for determining the eligible ITC provisions contained u/s 16 are only to be seen or also the provisions contained u/s 17(2) or 17(5) are also to be seen ?



# CONTENTIONS

- SECTION 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.
- Sec. 17(5)
  - Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall **not be available** in respect of the following, namely :—
- Sec. 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.
  - Rule 42 & 43 then provide for “reversal” (see Rule 42(1)(m))

# Poser - 4

- On which date shall the figure of eligible ITC in GSTR – 2A be considered ?

# CONTENTIONS

- Circular No. 123/42/2019 – GST dt. 11.11.2019
  - Amount of eligible ITC for computing the permissible ITC has to be seen as per GSTR – 2A available on the due date of filing of the returns in FORM GSTR-1 of the concerned suppliers.

# Poser - 5

- Whether ITC availed with respect to imports, ISD and tax payable under RCM is to be considered for determining the allowable ITC as per the sub-rule ?

# CONTENTIONS

- Circular No. 123/42/2019 – GST dt. 11.11.2019
  - Import, documents issued under RCM, credit received from ISD etc. is outside the ambit of the sub-rule

# Poser - 6

- Whether ITC availed with respect to the supplies received from the quarterly filers is to be considered for determining the allowable ITC as per the sub-rule ? If yes, how to identify them and when to make the comparison ?

# CONTENTIONS

- Circular No. 123/42/2019 – GST dt. 11.11.2019
  - Amount of eligible ITC for computing the permissible ITC has to be seen as per GSTR – 2A available on the due date of filing of the returns in FORM GSTR-1 of the concerned suppliers.
- No mechanism to identify quarterly filers.

# Poser - 7

- Whether ITC re-availed on payment after 180 days is to be considered for calculating the eligible amount ?



# CONTENTIONS

- As it is not fresh availment, it needs to be excluded from the purview of the Rule.

# Poser - 8

- Whether the restricted ITC is to be computed head-wise or aggregate of all the three heads (viz. CGST, SGST & IGST) ?

# CONTENTIONS

- It appears that the mechanism shall be applied head-wise.

# Poser - 9

- How can the Puzzled Ltd. avail the ITC in future which has been restricted for a particular tax period under the given sub-rule ?

# CONTENTIONS

<b>Tax period</b>	<b>Oct, 19</b>	<b>Nov, 19</b>
<b>ITC as per books</b>	10,00,000	12,00,000
<b>Eligible ITC as per 2A</b>	6,00,000	2,00,000 (for Oct 19) & 9,00,000 (for Nov 19)
<b>Permissible ITC</b>	7,20,000 (6,00,000 + 20%)	2,40,000 (for Oct 19 – 2,00,000 + 20%) & 10,80,000 (for Nov 19 – 9,00,000 + 20%)
<b>Restricted ITC</b>	2,80,000	40,000 (for Oct 19) & 1,20,000 (for Nov 19)

# Poser - 10

- Whether the said sub-rule can be considered as a valid law considering the provisions of the Constitution (viz. Article 14), Act as well as judicial precedents ?

# CONTENTIONS

- **Vires of the sub-rule**

- Article 14 of the Constitution of India
- 37<sup>th</sup> GST Council Meeting
  - With a view to impose **reasonable restriction** (to encourage the suppliers to file GSTR-1 ), the Law Committee recommended that ITC allowed to a registered taxpayer in respect of those invoices, the details of which have not been uploaded by the supplier as required under sub-section (1) of Section 37 of the CGST Act i.e. which is not reflected in FORM GSTR-2A shall not exceed 20% of the eligible credit available in respect of invoices and debit notes, the details of which have been uploaded by the supplier under Section 37(1) of GST Act.
- **Arise India Limited vs Commissioner Of Trade & Taxes (Del.)**
  - 42. All this points to a failure to make a correct **classification on a rational basis** so that the denial of ITC is not visited upon a bonafide purchasing dealer. This **failure to make a reasonable classification, does attract invalidation under Article 14** of the Constitution, as pointed out rightly by learned counsel for the Petitioners.

# CONTENTIONS

- **Vires of the sub-rule**

- Sec. 16(1) permits imposition of restriction only qua the tax charged on a particular supply
- Sec. 43A has not yet been notified.
- As GSTR – 3B is considered as GSTR – 3, it shall be deemed that the matching visualized u/s 41, 42 & 43 has been done away with.



# Poser - 11

- Whether the Circular No. 123/42/2019-GST dated 11-11-2019 issued in this regard is valid in law and whether the tax payers are bound by the same ?

# CONTENTIONS

- **Vires of the Circular**

- CCE v. Ratan Melting & Wire Industries (2008) 231 ELT 22
  - Circular contrary to law are invalid.
- “Subject to” – “conditional upon” K. R. C. S. Balakrishna Chetty & Sons v. State of Madras (1961 AIR 1152)
  - Circular therefore providing for the application of the sub-rule qua every tax period by considering the GSTR – 2A on the 11<sup>th</sup> of the concerned subsequent month is clearly going beyond the provisions of the sub-rule.

# Poser - 12

- What can be the consequences due to violation of the said sub-rule ?  
Can the department initiate proceedings u/s 73 or 74 of the CGST Act, 2017 ? What other actions can be taken by the department ?

# CONTENTIONS

- GSTR - 2A balance on due date to be considered.
  - Non-availability of legacy data.
- Hence the action proposed by the department shall lack the basis.

# **RULE 86A**

# CIRCUMSTANCES

- Rule 86A(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 inasmuch as –

.....

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

- “Reason to believe” – “reasons to be recorded”

# CONTENTIONS

- **Ajantha Industries And Ors vs Central Board Of Direct Taxes 1976 SCR (2) 884 (SC)**
  - When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the **vice of violation of the principles of natural justice** on account of omission to communicate the reasons is not expiated.
  - The reason for recording of reasons in the order and making these reasons known to the assessee is to **enable an opportunity to the assessee to approach** the High Court under its writ jurisdiction under article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case **for challenging the order**, inter alia, **either on the ground that it is based on irrelevant and extraneous condonations** Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question We are clearly of opinion that the requirement of recording reasons under section 127(1) is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee.

# CONTENTIONS

- **Union Of India vs Mohan Lal Capoor & Others 1974 SCR (1) 797 (SC)**
  - Reasons are the links 'between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. -Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.
- **P.K. Chowdhury and others V. Union of India and others (MP) 1976 MPLJ 690 (MP)**
  - Further, the reasons recorded must be relevant and germane to the content and scope of the power conferred by the statute and must show a reasonable nexus between the facts considered and satisfaction reached



# CIRCUMSTANCES

Clause	Circumstances
(a)(i)	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
(a)(ii)	without receipt of goods or services or both
(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
(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
(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

# TIME PERIOD

- Rule 86A(3)
  - Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction

# DATE OF COMING INTO EFFECT

- Inserted vide Notf no. 75/2019 – CT dt 26.12.2019

# VALIDITY OF THE RULE

- Sec. 49(4)
  - The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to **such conditions** and within such time as may be prescribed.
- Collector of Excise v. Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.).
  - 18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India [1999 (106) E.L.T. 3] this Court said that a credit under the Modvat scheme was “as good as tax paid.”

# VALIDITY OF THE RULE

- Whether condition can include complete restriction ?
- If condition implies restriction, whether it can be said that it is a reasonable restriction under Article 14 ?

# RECOURSE

- Sec. 107(1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.
- Petition before High Court/Supreme Court under Article 226/32.

**THANKS !!**

Abhay.Desai@ydco.in