

# GST - Issues in ITC with special reference to Rule 36(4)

PRESENTED BY: CA RAJAT TALATI  
WEBINAR – WIRC OF ICAI  
ON 28TH MAY 2021

# Agenda

- Overview Of ITC
- Sec 16, Rule 36(4) – Case Studies - GSTR 2A & 2B
- Order of utilisation of ITC & Case studies
- Covid 19 – Measures and other issues
- CSR and other exps
- DRC03 – Whether Cash or ITC?
- RCM paid in next FY – Whether ITC Available
- Keyman Insurance
- Sec 17(5) – Blocked Credit
- Other Issues
- Operation of Sec 17(3)
- Business restructuring – Sec 87 & Rule 41

# Overview of ITC

## For ITC

**What qualifies**

**Inward supply of**

### **Goods**

- >Inputs,
- >Raw materials,
- >Packing material
- >Processing material
- >consumables
- >Capital goods
- >etc

### **Services**

- >Input services
- >Expenses by way of services

**Conditions**

**to be used or intended to be used**

**In the course of business**  
**Or**

**furtherance of business**  
**(A very wide term)**

# Conditions for taking ITC

- Possession of Tax invoice or debit note or Bill of Entry issued by a registered supplier;
- Receipt of the goods or services or both
- Exception:
  - Goods- sales-in-transit & Services to any person at the direction of and on account of such registered person
  - Input and Capital Goods directly sent to job worker;
- Payment of tax by supplier – **subject to section 41 & 43A;**
- furnished the return;

# Conditions for taking ITC

- A person is not eligible to take ITC on any invoice or debit note -  
Earlier of
  - After Due date of furnishing of the return for the month of September of the next year (i.e. 20th October of next year)
- OR
- After furnishing of the relevant annual return (Due date of filing Annual return is 31st December of next year)
- Payment to supplier within 180 days:
  - if not paid, pay the amount equal to ITC availed + Interest.
  - subsequently, if paid to supplier, ITC can be claimed



# Sec 16 & Rule 36(4)

- Sec 16(1): Every RTP is entitle to take credit
- Sec 16(2): conditions
- Sec 16(3) – Can't claim ITC where depreciation taken
- Sec 16(4) – When can the ITC claimed- time period + GSTR 2A report etc
- Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.

# Rule 36(4)

- (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.
- Provided that the said condition shall apply cumulatively for the period February..... and August, 2020 and the return in FORM GSTR-3B .....for the tax period September, 2020.....
- Provided further that such condition shall apply cumulatively for the period April and May, 2021 and the return in FORM GSTR-3B for the tax period May, 2021 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.

# GSTR 2A

- Rule 59 [unamended] provided for filing return in GSTR 1 & no mention of GSTR 2A
- GSTR 2A – for information and verification by both tax payer and Department
- Rule 36(4) inserted vide Noti. 9/2019 wef 9.10.2019 providing the condition for uploading of outward supply transaction by supplier
  - No where it provided for condition for availment of ITC



# Can ITC be denied for want of reflection in GSTR 2A?

- GSTR 2A is not a return. It is mere statement.
- GSTR 2A has no legal backing – till IDT Provisions of Finance Act 2021 is notified
- GSTR 2A is a dynamic statement. Auto-drafted from GSTR1 of supplier
- Consider Sec 16(2)(C)
  - ITC not available if supplier has not paid the tax charged
  - Subject to Sec 41 [ITC - self assessed, provisional] – GSTR 2?
  - Subject to Sec 43A [Procedure for furnishing return & availment of ITC] **[Not notified]**

# GSTR2B/2A – mis matches – ITC?

- GSTR 3B is also auto-drafted statement similar to GSTR2A
- Rules 59 & 60 – as amended now provides for such statements wef 1.1.2021. Static statement
- **D. Y. Beathel Enterprises v. the State Tax Officer** dated 24.2.21 [2021-VIL-308-MAD]
  - Held: the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed seriously by the Revenue and strict action ought to have been initiated against the seller
- **Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited** [2018-VIL-01-SC]
  - SC affirms the DL HC decision. The Hon'ble High Court of Delhi held Section 9(2)(g) of Delhi VAT Act to the extent it disallows Input tax credit("ITC") to purchaser due to default of selling dealer in depositing tax, as violative of Articles 14 and 19(1)(g) of the Constitution of India.

# ITC matching with 2A as per Rule 36(4) - Departmental Circular (Circular No. 123/42/2019–

	Particulars	CGST	SGST	IGST
	As per GSTR 2A for the month _____			
ADD:	Cumulative Credit from GSTR2A pertaining to previous months (from October 2019)			
LESS:	Ineligible ITC from above (17(5) - motor car, gifts, insurance, food etc.)			
	Balance	0	0	0
ADD:	<b>20%</b> of above ( <b>PRESENTLY IT IS 5%</b> )	0	0	0
	Balance			
LESS:	Credit Already Availed (from previous months) (incl addl 20% if any)			
	<b>Maximum Credit eligible in the month (A)</b>	<b>0</b>	<b>0</b>	<b>0</b>
	Credit as per books			
LESS:	Ineligible ITC from above (17(5) - motor car, gifts, insurance, food etc.)			
	<b>Eligible Credit as per Books (B)</b>	<b>0</b>	<b>0</b>	<b>0</b>
	<b>Credit to be claimed in the books (Lower of A or B) (C)</b>	<b>0</b>	<b>0</b>	<b>0</b>

# Rule 36(4) – Case Studies

Particulars	CASE 1	CASE 2
As per GSTR 2A for the month October 19	80	100
LESS: Ineligible ITC from above (17(5) - motor car, gifts, insurance, food etc.)	2	2
Balance	78	98
ADD: 20% of above	15.6	19.6
<b>Maximum Credit eligible in the month (A)</b>	<b>93.6</b>	<b>117.6</b>
Credit as per books	100	100
LESS: Ineligible ITC from above (17(5) - motor car, gifts, insurance, food etc.)	5	5
<b>Eligible Credit as per Books (B)</b>	<b>95</b>	<b>95</b>
<b>Credit to be claimed in the books (Lower of A or B) (C)</b>	<b>93.6</b>	<b>95</b>

# Rule 36(4) – Case Studies

	Particulars	CASE 1(a)	CASE 1(b)	CASE 2(a)	CASE 2(b)
	As per GSTR 2A for the month November 19	40	15	40	15
ADD:	Cumulative Credit from GSTR2A pertaining to previous months (from October 2019)	85	85	103	103
LESS:	Ineligible ITC from above (17(5) - motor car, gifts, insurance, food etc.) - incl earlier ineligible (oct + nov)	5	5	5	5
	Balance	120	95	138	113
ADD:	20% of above	24	19	27.6	22.6
	Balance	144	114	165.6	135.6
LESS:	Credit Already Availed (from previous months) (incl addl 20% if any)	93.6	93.6	95	95
	<b>Maximum Credit eligible in the month (A)</b>	<b>50.4</b>	<b>20.4</b>	<b>70.6</b>	<b>40.6</b>
	Credit as per books (OCT PENDING)	1.4	1.4	0	0
	Credit as per books (Nov 19)	30	30	30	30
LESS:	Ineligible ITC from above (17(5) - motor car, gifts, insurance, food etc.) - current month	3	3	3	3
	<b>Eligible Credit as per Books (B)</b>	<b>28.4</b>	<b>28.4</b>	<b>27</b>	<b>27</b>
	<b>Credit to be claimed in the books (Lower of A or B) (C)</b>	<b>28.4</b>	<b>20.4</b>	<b>27</b>	<b>27</b>



# Utilisation and Order of utilisation of ITC

- Sec 49A -Utilisation of input tax credit subject to certain conditions
  - Only after IGST has first been utilized
- Sec 49B - Order of utilisation of input tax credit
  - Rule 88A in the CGST Rules allows utilization of input tax credit of IGST towards the payment of CGST and SGST, or as the case may be, UT GST, **in any order** subject to the condition that **the entire input tax credit on account of Integrated tax is completely exhausted first before** the input tax credit on account of CGST or SGST/ UTGST can be utilized.
  - Circular No. 98/17/2019-GST

# Circular No. 98/17/2019-GST

## Order of utilisation

Input tax Credit on account of	Output liability on account of Integrated tax	Output liability on account of Central tax	Output liability on account of State tax / Union Territory tax
Integrated tax	(I)	(II) - <b>In any order and in any proportion</b>	
<b><i>(III) Input tax Credit on account of Integrated tax to be completely exhausted mandatorily</i></b>			
Central tax	(V)	(IV)	Not permitted
State tax / Union Territory tax	(VII)	Not permitted	(VI)

# Order of utilisation of ITC – Scenario 1

FINAL LIABILITY			
Particulars	CGST	SGST	IGST
Output	1,00,000	1,00,000	7,00,000
Less : IGST Input (Current Month)			15,00,000
<b>Net</b>	<b>1,00,000</b>	<b>1,00,000</b>	<b>(8,00,000)</b>
Adj: Transfer			
IGST to CGST	(1,00,000)		1,00,000
IGST to SGST		(1,00,000)	1,00,000
<b>Net</b>	<b>-</b>	<b>-</b>	<b>(6,00,000)</b>
Less :Input (Current Month)	30000	30000	
Less: Refund B/f			
<b>Net</b>	<b>(30000)</b>	<b>(30000)</b>	<b>(6,00,000)</b>
CGST to IGST	-		-
SGST to IGST		-	-
<b>Payable/(Refund)</b>	<b>(30000)</b>	<b>(30000)</b>	<b>(6,00,000)</b>

# Scenario 2

FINAL LIABILITY			
Particulars	CGST	SGST	IGST
Output	1,00,000	1,00,000	7,00,000
Less : IGST Input (Current Month)			8,50,000
<b>Net</b>	<b>1,00,000</b>	<b>1,00,000</b>	<b>(1,50,000)</b>
Adj: Transfer			
IGST to CGST	(1,00,000)		1,00,000
IGST to SGST		(50,000)	50,000
<b>Net</b>	<b>-</b>	<b>50,000</b>	<b>-</b>
Less :Input (Current Month)	30000	30000	
Less: Refund B/f			
<b>Net</b>	<b>(30000)</b>	<b>20,000</b>	<b>-</b>
CGST to IGST	-		
SGST to IGST		-	
<b>Payable/(Refund)</b>	<b>(30000)</b>	<b>20,000</b>	<b>-</b>

Payable

But for amendment, there should be net credit of 10,000/- whereas there is cash outflow of 20,000/- and credit c/f of 30,000/- under CGST

# Scenario 2- Option for better utilization

FINAL LIABILITY			
Particulars	CGST	SGST	IGST
Output	1,00,000	1,00,000	7,00,000
Less : IGST Input (Current Month)			8,50,000
<b>Net</b>	<b>1,00,000</b>	<b>1,00,000</b>	<b>(1,50,000)</b>
Adj: Transfer			
IGST to CGST	(75,000)		75,000
IGST to SGST		(75,000)	75,000
<b>Net</b>	<b>25,000</b>	<b>25,000</b>	<b>-</b>
Less :Input (Current Month)	30000	30000	
Less: Refund B/f			
<b>Net</b>	<b>(5000)</b>	<b>(5000)</b>	<b>-</b>
CGST to IGST	-		-
SGST to IGST		-	-
<b>Payable/(Refund)</b>	<b>(5000)</b>	<b>(5000)</b>	<b>-</b>

Using the credit in another proportion, seems to optimise utilisation of credit.



# Scenario 3

FINAL LIABILITY			
Particulars	CGST	SGST	IGST
Output	1,00,000	1,00,000	7,00,000
Less : IGST Input (Current Month)			6,00,000
<b>Net</b>	<b>1,00,000</b>	<b>1,00,000</b>	<b>1,00,000</b>
Adj: Transfer			
IGST to CGST	-		-
IGST to SGST		-	-
<b>Net</b>	<b>1,00,000</b>	<b>1,00,000</b>	<b>1,00,000</b>
Less : Input (Current Month)	2,00,000	2,00,000	
Less: Refund B/f			
<b>Net</b>	<b>(1,00,000)</b>	<b>(1,00,000)</b>	<b>1,00,000</b>
CGST to IGST	1,00,000		(1,00,000)
SGST to IGST		-	-
<b>Payable/(Refund)</b>		<b>(1,00,000)</b>	-

SGST will carry Cr balance

# Covid 19 – Measures & other issues

- Covid related expenses on employees
  - Sanitizer, extra hygiene related expenses
- Staff insurance cover – Disaster Management Act
  - Guidance issued by MHA State & Local authorities
  - Provisions of sanitization of office, sanitization dispenser, mark & other measures taken to maintain social distancing.
- goods given away as part of covid relief
- goods given away at a discount / token value
- Goods damaged in transit – discovered on receipt within the range of tolerance / accepted norms with transporter.
- Goods stolen in transit.

# Covid 19 – Measures & other issues

- Stock -stale, unserviceable e.g. electronics parts , soiled goods e.g. display stock, w/off of stock
- contracts cancelled – unbilled revenue – not likely to be received – bills not raised – ITC qua those supplier?
- Amount paid to sub-contractor – say lab. Contractor on humanitarian grounds – is it supply?
- In the course of business – going concern
  - Post covid situations – Divisions closed
  - Diversion into other lines of business

## CSR Exps.

So what is to be examined for ITC?

- From Corporate's point of view
  - Is there any 'supply'
  - Is it for business or furtherance of business?
  - Is there any consideration?
- From NGO's point of view
  - Is there any inward supply?
  - Is it registered under GST Act?
  - Is there any consideration paid for such an inward supply?
  - Is there any outward supply with consideration received/receivable?
- **Where no ITC is available- the GST becomes a sunk cost**

# GST implications on CSR expenses

## Donations made to funds such as PM CARES Fund

- Not a supply u/s 7 of CGST Act

## Funds provided by company to trust/society under MOU / Government -local authorities

- **ITC implications in the hands of the company**
  - Is it in the course of Business? Co's Act Sec 135 – Obligation – Sec 17(5)(b) - proviso
  - CESTAT Mumbai in the case of **Essel Propack Ltd. v. Commissioner of CGST** (2018-VIL-61-CESTAT-MUM-ST) held that CSR is an input service in relation to business and CENVAT credit shall be available.
- **Tax implications in the hands of the trust/society**
  - Amount received by society from company is not in the nature of grant-in-aid and is covered in definition of 'consideration' for supply of goods or services. Society liable to pay GST Indian Institute of Corporate Affairs [(2019) VIL 231 AAR-New Delhi] – Exemption 12/2017 CT(R) Sr no 1 or 76. Trust registered under 12AA of IT Act



# GST implications on CSR expenses

Goods or services supplied by company to beneficiaries free of cost

- Eligibility of ITC for manufactured goods
  - 'in respect of' is synonymous with the expression 'on' - **Swasthik Tobacco Factory 17 STC 316 (SC)**
- Eligibility of ITC for traded goods
  - ITC disallowed on electrical goods distributed free of cost as CSR expenses u/s 17(5)(h) – **Polycab Wires Pvt. Ltd. Kerala AAR**
  - Any supply made under a contractual obligation cannot be termed as 'gift'.
- **M/s Dwarikesh Sugar Industries Limited 2021-VIL-168-AAR**. There is clear distinction between goods given as 'gift' and those supplied as a part of CSR activities. While the former is voluntary and occasional, the later is obligatory and regular in nature. CSR expenses are not incurred voluntarily, accordingly, they do not qualify as 'gifts'

# Payment in DRC -03- can ITC be utilized to pay the liability?

- Sec 41(1) – Credit of ITC as self assessed can be claimed in return on provisional basis
- Sec 49(2) – Electronic Credit Ledger – credited with input tax credit as per self assessed in the return
- Sec 41(2) – ITC can be utilized only for payment of self assessed output tax as per the return . Also see Sec 49(4)- Any payment of output tax
- Sec 59 – Self assessed tax –any tax period – return – monthly or quarterly
- Sec 2(82) – Out put tax – does not include RCM liability

# Payment in DRC -03- can ITC be utilized to pay the liability?

- Rule 86(2) – Electronic credit ledger shall be debited to the extent of discharge of any liability in accordance with Sec 49
- Rule 85(3) – payment as per return is subject to Sec 49
- Section 43A(2) → **not notified**
- Liability – DRC-03 – reasons
  - Output tax – Not as per self assessed tax as per return – Cash Only
  - ITC reversal – Not as per self assessed tax as per return – Cash Only
  - RCM – Not out put tax - cash only

# RCM paid in next FY

- RCM paid for 2018-19 in 2019-20. Is ITC available? Consider section 16(4)
  - Paid till 20th Oct 2019 – Report in A/R for 2019-20 and claim ITC in 2019-20 – press release
  - Paid after October 2019 onwards – Either pay in DRC -3 in cash for A/R 2018-19 or Report in A/R for the year in which RCM paid - no ITC allowed in either options. - 1st option preferred.
- What about RCM of 2017-18 and 2018-19 paid in 2020-21?
  - Self Invoice made on date of payment in 2020-21

# Keyman Insurance

- Premium paid for 'Keyman Insurance' policy
  - What is the nature of Insurance?
  - Is it a life insurance?
  - Will Sec 17(5) (b) attract?
- Other Staff Insurance/medical Exp

# Input Tax Credit (Blocked Credits) Sec. 17(5) of CGST Act, 2017

## CLAUSE (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;

## CLAUSE (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;



# Sec 17(5)

- Sec 17(5) (C) & (d) – ‘to the extent of capitalisation’
  - What does this mean? Capitalisation in books?
  - Rented premises – renovation exps including civil exps – flooring, toilet block, windows etc. Expensed out in books. Is ITC available?
  - What about amortization of expenses?
- Sec 17(5) (d) – ‘immovable property (other than plant and machinery)’
  - What does this mean?
  - Pl & Mach – RCC foundation – is capitalised in books
- ITC – goods given away as gifts. RM & PM purchased & FG given as gifts ? Is 17(5) attracted?

# Other Issues

- Normal scarp generated in mfg. Any reversal of ITC?
- TRAN -1 & TRAN -2. Any application of Rule 42 & 43?
  - Definition of Input Tax – Sec2 (62)
- Non- business exps – Rule 42(j) – 5% of exps
  - Tax Audit report mentions – 5% telephone as personal exps added back – ITC to be disallowed
- ITC : output services – say sponsorship services, RCM in the hands of recipient, in the hands of supplier – Exempt supply?
- Proviso to Rule 28 – ‘Full ITC’ – What does it means?

# Operation of 17(3)

- Section 17(2) & Section 17(3) – only exempt supply – will Rule 42-43 apply? Trigger of section 17(3) – only when 17(2) apply
  - Party for exempt & partly for taxable

# Business restructuring – Sec 87 & Rule 41

- Sale of business – exempt Service (Sr. no.2 – 12/2017) – Rule 42/43? Or is it a 'non-GST supply transaction'?
- Merger
  - HC order date - Appointed date – earlier
- Transactions inter-se between two merging entities – Sec 87
  - Interstate
  - Intra state
- Transactions between two demerging entities
  - Interstate
  - Intra state

# Business restructuring – Sec 87 & Rule 41

- Pre-GST – Post-GST period involved
  - TRAN-1 filed by either of the entity
  - TRAN-1 ITC?
    - Can credit of balance out of TRAN-1 transferred by way of filling ITC-02?
- To avail ITC by merged /demerged entity section 18(3) – Form ITC-02
  - IT -02 when to file
  - Practically issues – time limit
  - What if ITC of transformer to be reversed?
- Is ITC to be transferred project-wise/ line of business / ITC attributable to that business?
- Cir 133/2020 Mar 2020. State-wise , Ratio of Value of assets transferred to not transferred irrespective of whether ITC claimed or not.



