

# Subodh Vora & Co.

## Chartered Accountants



# Recent Notices under GST pertaining to ITC

ITC Governing  
Authorities

- 1 Directorate General of GST Intelligence (DGGI)
- 2 Directorate of Revenue Intelligence (DRI)
- 3 Anti- Evasion Wing, GST Department
- 4 Jurisdictional GST office
- 5 Notices issued under ASMT-10



# SECTION 16(2) --- of CGST Act

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**Chartered Accountants**

## S. 16 Eligibility and 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;

(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;

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

(c) subject to the provisions of section 41, 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:

## 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 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



The background features a grayscale image of a tax form on the left, two pencils in the upper center, and a pen on the right. A large, semi-transparent brown rectangle is centered over the image, containing the main title.

# ITC- Vested Right?

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## ITC IS VESTED RIGHT...

- *Eicher Motors [8 1999 (106) ELT 3 (SC)] dt 28.01.99*

Right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed

- *Dai Ichi Karkaria [1999 (112) ELT 353 (SC)] dt 11.08.99*

Credit validly availed is a vested and indefeasible right and cannot be taken away without the authority of law. Credit is as good as tax paid

- *Madhusudhan Industries [2014 309 ELT 54 Guj HC]*

Credit is a vested right under money credit scheme and the assessee is allowed to utilize such credit even after abolition of the notification providing for utilization of such credit.

## ITC IS A CONCESSION...

- *JCB India Ltd [Bom HC 20.03.2018]*

We are of the opinion that there is nothing indefeasible or absolute in the right claimed under the existing law or in transitional arrangements set out, or in the substantive provisions permitting availing of input tax credit

- *Godrej & Boyce Mfg Co Pvt Ltd [1992 3 SCC 624 (SC)] dt. 30.06.1992*

No valid grievance can be made in respect of such deduction when the very extension of the benefit of set-off is itself a boon or a concession. It was open to the rule Making authority to provide for a small abridgement or curtailment while extending a concession

- *Jayam and Company [2016 15 SCC 125] dt 17.07.13*

ITC given under Section 3(3) of TN VAT Act is really a benefit/concession in respect of certain taxable transactions. The ITC provided under Section 3(3) is really a benefit or indulgence. While so, it is open to the State Legislature to impose conditions and restrictions while extending the concession



## ...ITC IS VESTED RIGHT

- *Rasoil Limited [(2004) 176 ELT 101 (Cal)]*

We are of the opinion that the respondents should consider the request of the appellants made by the letter. All points including the nature and scope of the credit available to the appellants are kept open

## ...ITC IS A CONCESSION

- *UOI vs Mohit Minerals Pvt Ltd [17 GSTL 561 (SC)]*

Giving credit or set off in the payment is legislative policy which had to be reflected in the legislative scheme. Compensation to States Act, does not indicate giving of any credit or set off of the Clean Energy Cess already paid till 30.06.2017. Thus, claim of the petitioner that he is entitled for set off in payment of Compensation to States Cess to the extent he had already paid Clean Energy Cess cannot be accepted.

- *Mahalaxmi Cotton Ginning Pressing & Oil Industries [W.P. 33 of 2012 dt. 11.05.2012]- Maharashtra VAT*

The right to obtain a set off is a right conferred by statute and the legislature while recognizing an entitlement to a set off in certain circumstances is lawfully entitled to prescribe the conditions subject to which a set off can be obtained. If the legislature, as in the present case, prescribes that a set off should be granted only to the extent to which tax has been deposited in the treasury on the purchase of goods, it is within a reasonable exercise of its legislative power in so



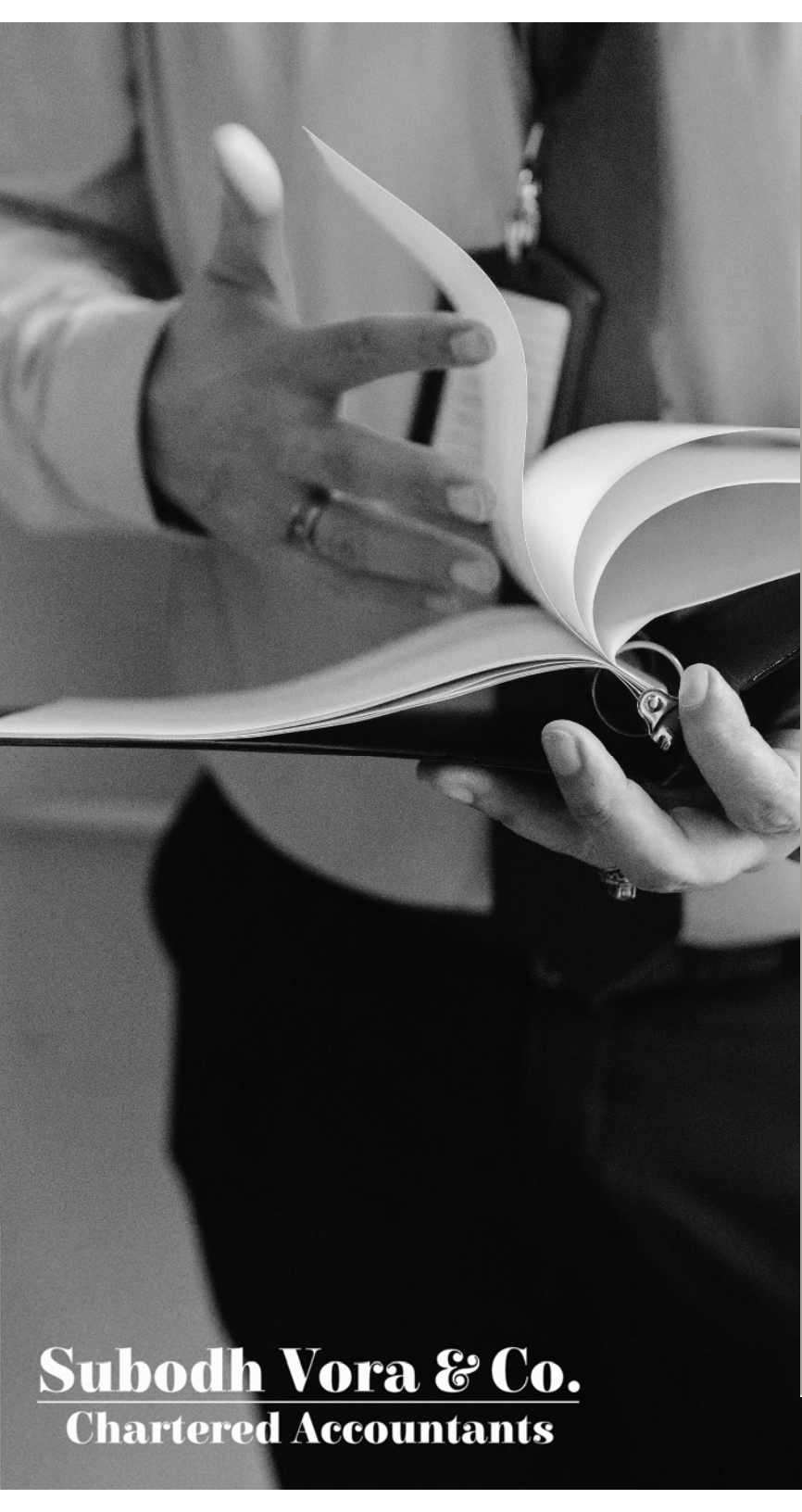
# OTHER IMPORTANT DECISIONS

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M/s DY Beathel Enterprises [TS (DB) GST HC (MAD)-21-22] dt 24.02.21

- *Revenue does not appear to have taken any recovery action against the seller nor has taken a stand that the assessee has not even received the goods*
- *When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax must have been viewed very seriously and strict action ought to have been initiated against him;*
- *The sellers ought to have been examined and they should have been confronted,*
- *Remanded the matter to the Assessing Officer and parallely, directs initiation of recovery action against the sellers*



Arise India Ltd [W.P.2106/ 2015 dt.26.10.2017]-  
Delhi VAT

- *If the Commissioner has not placed such information in the public domain, then it is next to impossible for the purchasing dealer to ascertain the failure of the selling dealer to make a correct disclosure of the sales made in his return.*
- *In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC.*
- *Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act*



M/s ONXY Designs [2019(6) TMI 941]

Karnataka VAT

- *It is clear that the benefit of input tax cannot be deprived to the purchaser dealer if the purchaser dealer satisfactorily demonstrates that while purchasing goods, he has paid the amount of tax to the selling dealer.*
- *If the selling dealer has not deposited the amount in full or a part thereof, it would be for the revenue to proceed against the selling dealer*



# ITC SCRUTINY PARAMETERS

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**Chartered Accountants**

ITC SCRUTINY  
PARAMETERS

- 1 Vendor's statement- Supply of only invoice
- 2 Purchase from Non Existing dealers
- 3 Non Filer of GSTR-1 & GSTR 3B by vendor
- 4 Non Filing of GSTR-1
- 5 GSTR-1 filed after due date
- 6 GSTR 2A Mis-match
- 7 Import IGST Icegate mismatch

# Statement of vendor admitting invoicing without supply of goods

## Background:

- Department has recently conducted proceedings against Fake Invoicing dealers.
- Department has evidence and recorded statement of the person who have supplied only invoice without actual delivery of goods
- 350+ arrests | More than 10,000 fake GSTIN
- In such cases, GST returns are filed and even GST has been paid vide GSTR 3B

## Legal Analysis:

- Section 16(2)(b) condition appears to be violated i.e. no receipt of goods
- As per S. 155, burden of proof of claim of ITC lies on the recipient.
- Documentary evidence- Eway Bill | lorry receipt | Weighbridge slips | Toll receipts | Vendor confirmation | Transporter confirmation
- Having produced such evidences, the onus of proof of malafide intention shifts to department

## SCENARIO I (DGGI, Anti Evasion)....



- Statement should be very specific- case of bogus plus genuine transactions possible

Garima Enterprise [2005 (182) ELT 106 (Tri-Delhi) | Motabhai Iron & Steel Industries [2014 (302) ELT 69 ( Tri- Ahm)

- Coercive actions by department

-Issuance of summons

-Raids

-Bank Attachment

- Blocking of Electronic Credit Ledger

-Non bailable arrest wherein GST>5 Cr

-Arrest of Chartered Accountants

## ....SCENARIO I (DGGI, Anti Evasion)

# Purchase from Non Existing dealer

## Background:

- During the course of investigation, certain vendors are not found at their normal place of business and hence classified as non-existing dealers
- GST registration for such vendors are cancelled from a particular date
- In such cases, GST returns are filed and even GST has been paid vide GSTR 3B by such non existing dealers

## Legal Analysis:

- No express proof from department relating to violation of Section 16(2)(b) condition i.e. receipt of goods
- As per S. 155, burden of proof of claim of ITC lies on the recipient. Secondary proofs such as Accounts confirmation, payment proof, transporter details, Eway Bill., lorry receipt, weighbridge slips, Toll receipts may be produced

## SCENARIO II (DGGI, Anti Evasion)

# Non Filer of GSTR-1 & GSTR-3B

## Background:

- Based on GSTR 2A mis-match, it is observed that the purchase vendor has neither filed GSTR-1 nor filed GSTR 3B
- The vendor is unable to file GSTR 3B on account of slowdown in the industry or any other reason.
- The tax-payer may or may not have made payment to the vendor

## Legal Analysis:

- Violation of Section 16(2)(c) i.e. non payment of tax to the treasury of the government
- **Section 76- Tax collected but not paid to government:**

Where any amount is required to be paid to the Government and which has not been so paid, the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why should not be paid by him to the Government

- **Section 79- Recovery of tax on defaulting seller**

**SCENARIO III (ASMT-10 & SMS by GSTN)....**

- Press Release dated 04.05.2018

*“In case of default in payment of tax by the seller, recovery shall be made from the seller however reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.”*

- Judicial precedents in case of DY Beathel Enterprises, Mahalaxmi Cotton Ginnings
- Above discussion not applicable in cases wherein payment to vendor is pending, goods have not been received or any other reason.

.....SCENARIO III (ASMT-10 & SMS by GSTN)

# Non Filer of only GSTR-1

## Background:

- Based on GSTR 2A mis-match, it is observed that the purchase vendor has not missed the invoice entry GSTR-1 or has shown the transaction under B2C column instead of B2B column
- Vendor has rightly discharge GST vide its GSTR-3B and the tax-payer has also made full payment to the vendor

## Legal Analysis:

- Since GST payment is made, no violation of Section 16(2)(c) i.e. payment of tax to treasury of the government
- Since GSTR-1 is also filed, no violation of Section 16(2)(d) i.e. filing of GST returns

- Press Release dated 18.10.2018-

*“It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis”*

## SCENARIO IV (ASMT-10 & SMS by GSTN)...

- M/s Sun Dye Chem [Mad HC] dt. 06.10.2010

*“The error committed by the petitioner is an inadvertent human error and the petitioner should be in a position to rectify the same, particularly in the absence of an effective, enabling mechanism under statute. The petitioner is permitted to re-submit the annexures to Form GSTR-3B”*

- GSTR-2 & GSTR 3 mechanism never operationalized by GSTN
- Rule 36(4) introduced to plug above wef 09.10.2019. Rule 36(4) challenged before Supreme Court in case of Mohini Bipin Patel
- Merely on account of procedural lapse of punching of GSTIN, ITC cannot be disallowed.
- Documents such as Vendor declaration, account confirmation, GST payment proof may be obtained

## .....SCENARIO IV (ASMT-10 & SMS by GSTN)

# GSTR-1 filed after due-date

## Background:

- Based on GSTR 2A report of vendors, it is observed that the purchase vendor has filed GSTR-1 post due date of September
- Proviso to S. 39  
*Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier*
- Vendor has rightly paid GST vide its GSTR-3B and the tax-payer has also made full payment to the vendor

## SCENARIO V (ASMT- 10)

### Legal Analysis:

- Since GST payment is made, no violation of Section 16(2)(c) i.e. payment of tax to treasury of the government
- Since GSTR-1 is also filed, no violation of Section 16(2)(d) i.e. filing of GST returns
- Late filing of GSTR-1 is a procedural lapse and substantive benefit under any law cannot be denied on account of procedural lapse

## SCENARIO V (ASMT- 10)



# GSTR 2A mis-match with column 8A of Annual Return

## Background:

- Based on difference of Column 8A & 8B of GSTR-9, ASMT-10 notices are being issued to the tax-payer

G	Reversal of TRAN-2 credit	0.00	0.00		
H1	Others	0.00	0.00	16,003.00	0.00
I	Total ITC Reversed (Sum of A to H above)	0.00	0.00	16,003.00	0.00
J	Net ITC Available for Utilization (6O - 7I)	49,62,245.48	20,57,096.48	1,17,53,537.77	0.00

Pt. III	Details of ITC for the financial year				
Sr.No	Details	Central Tax(₹)	State Tax / UT Tax(₹)	Integrated Tax(₹)	Cess(₹)
	1	2	3	4	5
<b>8</b>	<b>Other ITC related information</b>				
A	ITC as per GSTR-2A (Table 3 & 5 thereof)	20,18,715.18	20,18,715.13	45,96,772.28	0.00
B	ITC as per sum total of 6(B) and 6(H) above	19,87,496.48	19,87,496.48	46,90,403.77	0.00
C	ITC on inward supplies (other than imports and inward supplies liable to reverse charge but includes services received from SEZs) received during 2017-18 but availed during April 2018 to March 2019	1,72,652.00	1,72,652.00	1,76,679.00	0.00
D	Difference [A-(B+C)]	-1,41,433.30	-1,41,433.35	-2,70,310.49	0.00
E	ITC available but not availed	0.00	0.00	0.00	0.00

SCENARIO VI (ASMT-10)....

## Legal Analysis:

- Column 8A auto-populates GSTR2A figure as on cut-off date at the time of filing of GSTR-9. GSTR-1 filed post cut-off date are not reflected in column 8A of GSTR-9 and hence gives a distorted picture
- Column 8B of GSTR-9 cannot be taken base and cannot be considered as true ITC claimed. It does not consider in many factors such as ITC reversed during the year, ITC claimed in next year, ITC reversed in next year, ineligible ITC, excess credit in GSTR 2A, etc
- Hence, comparison of column 8A and 8B will provide a distorted picture.
- Tax-payer will have to undertake detailed reconciliation with latest GSTR 2A appearing on GST portal and actual ITC take for a financial year and thereafter submit a suitable reply.

.....SCENARIO VI (ASMT-10)

# Import IGST Icegate mismatch

## Background:

- Based on difference of integration of Icegate data, Customs data and GSTR 2A, mis-match is observed between Import IGST claimed in annual return

## Legal Position:

- Icegate is utility provided to importer & exporter to view its transaction. Due to technical reasons, it might be possible that Import data are not properly transmitted and reconciled with GST system.
- As per Rule 36(d), BOE is the valid document based on which ITC on import of goods is to be availed by tax-payer.
- Thus, copy of BOE & IGST paid challan may be annexed as reply to the notice wherever there is a mismatch

## SCENARIO VII (ASMT-10)

# THANK YOU

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D-723/ 724, Neelkanth Business Park,  
Vidyavihar (West), Mumbai 400086



022-25148595 | 022-2514859 |

+91 9152729402 | +91 9152729403 |

+91 8291466022



[www.scvora.com](http://www.scvora.com)

## PARTNERS

**Subodh Vora**

M: +91-9821151467 | E: [subodh@scvora.com](mailto:subodh@scvora.com)

**Kush Vora**

M: +91-9821305187 | E: [kush.vora@scvora.com](mailto:kush.vora@scvora.com)

**Bhakti Vora**

M: +91-9821362481 | E: [bhakti.vora@scvora.com](mailto:bhakti.vora@scvora.com)

**Piyush Gada**

M: +91-9773434725 | E: [piyush.gada@scvora.com](mailto:piyush.gada@scvora.com)

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