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Rule 36(4) and other issues in claiming ITC under GST Act

This subject can be divided in 4 parts.

- A- Documents required
- B- Furnishing of Returns
- C- Last date after which it cannot be claimed (Due date for September of subsequent year or annual return whichever is earlier)
- D- Payment of tax by the supplier in cash or through ITC

- Part A, B, & C are within the control of recipient.
- Part D depends on the discipline & honesty of supplier.
- Details of **each** invoice and debit note shall be maintained and produced on demand.
- Though Form GSTR-2 is not yet activated, unless the input register having invoice wise details is ready, ITC in Form GSTR-3B shall not be claimed.

How to ascertain the payment of tax by supplier in cash or through ITC?

- Fortunately, in MVAT Act and under GST Act, payment of tax by the supplier in cash or through ITC is not literally taken by the authorities.
- Therefore uploading of Annexure J-1 and GSTR-1 by suppliers is being taken as tax actually paid.
- Otherwise, in a case where supplier's ITC is disallowed u/s 48(5) of MVAT Act or u/s 16(2)(c) of CGST Act would have made recipient's life miserable in establishing his ITC as well as of all suppliers in the chain.
- Therefore filing of GSTR-1 by suppliers is enough.
- Download 2A of supplier and match with ITC register.

- In case of matched - full ITC.
- In case of mismatched - Rule 36(4) provides to claim additional 20/10 percent of matched ITC.
- Rule 36(4) amended after Notification No.49 of 2019 dated 09.10.2019 is reproduced below.
- **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 supplier under sub-section (1) of Section 37, shall not exceed ten percent of the eligible credit available in respect of invoices or debit notes, the details of which have been uploaded by the supplier under section 37(1).
- See Circular No.123/42/2019-GST dated 11.11.2019 clarifying the sub-rule (4).

Issue: The concept of granting additional 20/10 percent of matched ITC is provided vide sub-section (4) of Section 43A, which is not yet brought into force. Therefore the question is, whether the introduction of Rule 36(4) is valid?

Answer:

- The entire Rule 36 has been prescribed to provide for “documentary requirements and conditions for claiming ITC”.
- The power to prescribe the aforesaid entire rule is derived from Section 16(2), 37 or 38.
- Therefore, Rule 43A commence with the words “notwithstanding anything contained in Section 16(2), 37 or 38”.
- In view of the above, it cannot be said that sub-rule (4) of Rule 36 has been introduced only for the purpose of sub-section (4) to Section 43A.

- Section 43A is to lay down the “procedure for furnishing return and availing ITC.”

- It is not for grant of ITC.
- The parent provisions for availing ITC are under Section 16 to 21 of Chapter-V.

Section 43A(1):

- Notwithstanding anything contained in Section 16(2), 37 or 38
- Every registered person shall, in the returns furnished under Section 39(1),
- Verify, validate, modify or delete the details of supplies furnished by the suppliers.

Section 43A(2):

- Notwithstanding anything contained in Section 41, 42 or 43,
- the procedure for availing ITC by the recipient and verification thereof shall be such as may be prescribed.

Section 43A(3):

- The procedure for furnishing the details of outward supplies by the supplier on the common portal,
- for the purpose of availing ITC by the recipient shall be such as may be prescribed.

Section 43A(4):

- The procedure for availing ITC in respect of outward supplies not furnished under sub-section (3),
- shall be such as may be prescribed, and,
- such procedure may include the maximum amount of the ITC which can be so availed, **not exceeding twenty/ten per cent of the ITC**, on the basis of details furnished by the suppliers under said sub-section.
- For the aforesaid purpose **Rule 36(4)** is introduced.

- Circular No.123/42/2019-GST dated 11.11.2019 has been issued by the Principal Commissioner (GST) to clarify various issues regarding Rule 36(4).

Section 43A(5):

- The amount of tax specified in the outward supplies for which the details have been furnished by the supplier under sub-section (3),
- shall be deemed to be the tax payable by him.

Section 43A(6):

- The supplier and the recipient shall be jointly and severally liable to pay tax or to pay ITC availed,
- in relation to outward supplies for which details have been furnished under sub-section (3) or (4),
- but return thereof has not been furnished.

Section 43A(7):

- For the purposes of sub-section (6),
- the recovery shall be made in such manner as may be prescribed, and
- such procedure may provide **for non-recovery of an amount of tax** or ITC wrongly availed not exceeding one thousand rupees.

Section 43A(8):

- The procedure, safeguards and threshold of the tax amount in relation to outward supplies, the details of which can be furnished under sub-section (3) by a registered person,-
 - (i) Within six months of taking registration;
 - (ii) Who has defaulted in payment of tax and where such default has continued for more than two months from the due date of payment of such defaulted amount,shall be such as may be prescribed.

Issues on Rule 36(4):

1 Why Rule 36(4) permits additional ITC @10% over matched amount?

Answer: As the time to file GSTR-1 is being extended from time to time, there is a possibility that the suppliers may file it in future and additional transactions will be reflected in GSTR-2A. Therefore this concession is given on provisional basis. When ITC will be finally checked by the proper officer, and it is found that some of the suppliers have not filed GSTR-1, excess @10% claimed as per sub-rule (4) will be recovered as output tax.

2 What is the effective date for sub-rule (4) of Rule 36?

Answer: The Notification provides that it is applicable w.e.f. its publication i.e. 09.10.2019. The question is for which transactions it is applicable?

(i) Whether for transactions on or after 09.10.2019,

or

(ii) for transactions claimed in GSTR-3B of any tax period, uploaded on or after 09.10.2019.

In fact, additional grant of 10% is provisional and not final. It only guides the recipient regarding the status of filing GSTR-1 by the suppliers. Therefore it should be treated as applicable on the basis of Form GSTR-2A downloaded for the purpose of filing GSTR-3B of any tax period which is being uploaded on or after 09.10.2019.

3 Whether the restriction of 10% is to be calculated supplier wise or on consolidated basis?

Answer: In Para 3(2) of the said circular it is clarified that it is not supplier wise. However it is required to be taken into account that those who want to follow Section 16(2)(c), should not claim additional ITC @ 10% on consolidated basis, in case of transactions not

reflected in GSTR-2A, as, said 10% is being granted on provisional basis.

4 Un-matched ITC to be forgotten forever?

Answer:

- The recipient, at the first instance, should take efforts, to convince the supplier, to upload/amend his GSTR-1.
- Where such uploading/amendment is not possible for any technical glitch or legal bar, documentary evidence regarding accepting such transactions and payment of tax should be obtained from the supplier.
- Only thereafter, the claim can be raised before the jurisdictional authorities and as the case may be before the Courts.
- But before this, it is appropriate to understand all the provisions of ITC,
- Especially, pertaining to cross check mechanism available with the proper officer.

Section 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 utilisation of ITC admissible in respect of the said supply.
- In fact, the words “actually paid” should be read as “actually not paid”.
- In order to disallow ITC, the Proper Officer shall establish that tax is actually not paid.
- In other words the onus is on proper officer to prove the failure of supplier, instead of directing the recipient to prove.

Morarji Paper Products(Bombay High Court Judgment dated 05/08/2014 in Sales Tax Reference Application No.4 of 2002 in Reference Application No.67 of 1997):- The Court rejected the Sales

Tax Reference application of the Department contending that the Tribunal has wrongly granted the set-off without considering that Section 42(3) as it stood then as well as it stands today declares that the amount of draw-back, set-off or refund shall not exceed the amount of tax in respect of the same goods paid, if any, into Government Treasury and therefore the order passed by the Tribunal needs to be set aside, particularly, when there was no dispute that the amount of tax was not paid into Government Treasury by the supplier. **In Para 9 of the said judgment, Court observed** “However, we clarify that we have not examined any wider question or controversy particularly with regard to the applicability of Section 42(3) of the BST Act, as it then stood and as it stands now. In an appropriate case, this Court may decide as to whether there is a difference in the language of the un-amended and amended provisions and secondly whether the mandate of the Section is that the amount of refund shall not exceed the tax in respect of the same goods paid into the Government Treasury. Can this provision be applied to set-off or restricted in its application to draw-back or refund alone. We are keeping open this controversy for being decided in an appropriate case.”

Section 41- Claim of ITC and provisional acceptance thereof:

- Every registered person shall, be entitled to take credit of eligible ITC,
- as **self-assessed**, in his return, and
- such amount **shall be credited** on a **provisional basis** to his electronic credit ledger.

Section 42(1) – Matching, reversal and reclaim of ITC:

- The details of **every** inward supply,
- furnished by recipient,
- for a tax period,
- shall be matched, **(by whom? By the proper officer)**

- with the corresponding details of outward supply furnished by the corresponding supplier, in his valid return,
- for the same tax period or any preceding tax period.
- Tax period means “the period for which the return is required to be furnished. **[Section 2(106)]**

Issue: Whether notice received for mismatching of ITC between 3B and 2A are valid?

Answer:

- ITC disallowance shall be transaction wise, because, in GSTR-1, all invoices and debit notes shall be shown by the supplier.
- Presently, as GSTR-2 is not activated, recipient cannot show all invoices and credit notes.
- In view of the above, proper officer is unable to find out each transaction not included by supplier in GSTR-1.
- As the onus to prove non-payment of tax on each outward supply is on proper officer, said notices are invalid being on summary basis.
- If it is not replied/complied, he cannot pass the transaction wise order to disallow the ITC.
- At the most he can select the case for scrutiny of all input transactions and direct the recipient to furnish all input transactions and thereafter he shall match it with GSTR-1 of all suppliers for passing order to disallow such ITC.
- **So it is advisable to ask details of each transaction on which suppliers have failed to pay tax.**

S.P. & Co. and another (Vat Appeal No. 3 & 4 of 2009 decided on 06/04/2009):- It was held “it may be that second allegation regarding vendor not having paid tax can be proved by the Revenue with the help of relevant record relating to these vendors but, in that case, it is to be noted that the facts in that regard have to be clearly brought on record transaction wise.

That means the Revenue will have to prove that on very goods purchased by the Appellant, the concerned vendor has not paid tax. In that view of the matter, if a particular vendor has been selling his goods to various parties including the present Appellant and if the vendor has made partial payment, then in that case merely on the basis of return and tax payment, the allegation qua particular purchase cannot be proved unless the transaction wise verification is made. However, in that regard, nothing has been brought before us to show that the department has done any investigation in the matter and whether it is correlated to particular purchases of the Appellant that the corresponding sales of vendors on which non-tax payment is alleged. As the allegation of supplier's failure to pay tax is not established transaction wise, the said recovery of sales tax from the Petitioner is bad in law."

Issue: There is no provision to initiate comprehensive assessment for the entire year.

Issue: Matching shall be done for each tax period. But nothing is being done tax period wise. Therefore there is no finality at the end of any particular year qua all tax periods included in it. Allowing to include transactions not contained in the tax period for which 3B or GSTR-1 is being filed, have resulted in no finality as explained above.

Section 42(2):

- The claim of ITC matched with details of corresponding outward supply,
- shall be communicated to recipient.

Issue: It is mandatory to proper officer to communicate such details to recipient.

Issue: Similar provision is also there in case of Section 42(3) discussed hereinafter.

Section 42(3):

- Where the ITC is in excess of tax declared by the supplier for the same supply,
- or the outward supply is not declared by the supplier in his valid returns,
- the discrepancy shall be communicated,
- **to both** such persons.

Issue: As no communication is being made to supplier, what remedy is available with the recipient.

Answer: The recipient should write to his proper officer as well as to supplier's proper officer, to take action against non-payer. I have filed a Writ Petition to Bombay High Court asking to take suitable action against proper officers for such failure and direct them to act before supplier's assessment becomes time barred. This will be helpful to quash the action of disallowance of ITC because of failure of both the proper officers to take appropriate action.

Section 42(4):

- Duplication of claims of ITC,
- shall be communicated to the recipient,
- in such manner as may be prescribed.

Section 42(5):

- The amount which is not rectified by the supplier,
- in his valid return for the month in which discrepancy is communicated,
- shall be added to the output tax liability of the recipient,
- in his return for the succeeding month in which the discrepancy is communicated.

Issue: Forcing the recipient to pay back ITC by making self-assessment, and recovery by sending notices. Both are premature. What a recipient should do?

Answer: Appointment of Commissioner is to carry out all the purposes of the Act. If he invokes all Sections against recipient but failed to invoke charging Section 9(1) against defaulting supplier, the case is arguable for setting aside the action of recovery from recipient. It can be submitted that the said amount of ITC cannot be denied and the amount of tax to that extent cannot be recovered from recipient, as the said liability arose because of failure of the Principal Commissioner and his subordinate officers to recover the said tax from the selling defaulting vendors. In such case the said loss of revenue should be borne by the Government.

Section 9(1): Subject to provisions of sub-section (2), there shall be levied a tax called CGST on all intra state supplies of goods or services or both, ----- on the value determined under Section 15 and at such rates, not exceeding 20% as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

Section 3: The Government shall, by notification appoint the following classes of officers for the purposes of this Act, namely -----.

Section 5 -Powers of officers: Subject to such conditions and limitations as the board may impose, an officer of Central Tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

Section 42(7):

- The recipient shall be eligible to reduce,
- from his output tax liability,
- the amount added under sub-section (5),
- if the supplier declares the details of the invoice or debit note in his valid return,
- within the time specified in sub-section (9) of Section 39.

Section 39(9):

- Subject to Section 37, if any registered person after furnishing a return,

- discovers any omission or incorrect particulars therein, other than as a result of scrutiny, by the tax authorities.
- he shall rectify such omission in such form and manner as may be prescribed,
- subject to payment of interest,
- provided that no such rectification shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of financial year or the actual date of furnishing of relevant annual returns which is earlier.

Issue: Whether a prohibition to claim ITC after the prescribed date is valid?

Answer: The view taken by the Tribunal in number of cases is that every return filed before assessment shall be taken into account by the assessing officer. Even if any transaction is not included in the returns filed, the policy of the department was to grant ITC after verification. Therefore it is arguable case, provided the attempt is made by the recipient by filing letters, sending emails to proper officer and other authorities to allow the same.

*******Thank You*******