

Input Tax Credit - Vested Right or Concession?

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Input Tax Credit - Vested Right or Concession? Five questions:

The Madras High Court in [2020-TIOL-1364-HC-MAD-GST](#) has framed five questions:

- (1) Whether Input Tax Credit is a vested right and therefore, whether the imposition of a time limit for transitioning or utilisation thereof is constitutionally impermissible?
- (2) Whether the time limit imposed in Rule 117 of the CGST Rules is mandatory or directory?
- (3) Whether Section 140 of the CGST Act read with Rule 117 of the CGST Rules divests the assessee of an alleged vested right or whether it prescribes conditions relating to the enforcement of such right?
- (4) Whether the assessee has a legitimate expectation that the Input Tax Credit availed under the erstwhile tax regime should be permitted to be transitioned to the new tax regime without imposing a time limit?
- (5) Whether the deprivation of the benefit of transitional Input Tax Credit would amount to double taxation of the assessee as alleged?

These are questions agitated or being agitated in several High Courts and the Apex Court. For the last three years, we are not able to decide these simple issues in an otherwise good and simple tax. Is the credit a vested right? Many lawyers and taxpayers believe it is so, but tax officers and some courts have a different opinion. It is often quoted that in the famous **Eicher Motors** case - [2002-TIOL-149-SC-CX-LB](#), it was held that credit is a vested right. But it was only argued that it was a vested right and Revenue argued that there was no such vested right. The Supreme Court however held that

provision for facility of credit is as good as tax paid till tax is adjusted on future goods on the basis of the several commitments which would have been made by the assessee concerned.

It is not often recalled that the government promptly got Parliament to retrospectively amend the law to undo the Supreme Court judgement.

The Supreme Court in the case of **Ald Automotive** - [2018-TIOL-385-SC-VAT](#) held that **input credit is in nature of benefit/ concession extended to dealer under the statutory scheme.**

In the **Nelco** case - [2020-TIOL-641-HC-MUM-GST](#), Bombay High Court held that **availment of input tax credit under section 140(1) is a concession attached with conditions of its exercise within the time limit.**

There are more than a hundred cases in various High Courts on this silly issue as to whether the transitional credit should be disallowed for great events like the GSTN doing the vanishing trick or the taxpayer not being able to file his return.

Is it fair for the government to fight this insignificant battle with all its might? As the Supreme Court said, **facility of credit is as good as tax paid,**

and you know well that the credit earned is because of the tax paid, which the government has already got and must have spent. The government is not going to go broke, just by granting this credit (government knows many better ways - to go broke, not grant credit), but many taxpayers will. Was GST meant to kill enterprise? Even if your taxpayer has done something wrong, can't you as government forgive and allow him to breathe, especially in this Corona times?. Now the entire Revenue machinery will be at work to answer the five questions of the Madras High Court. The government will use all the legal acumen at its command to deny credit of the tax PAID by those hapless

assessee. In a recent TIOL webinar, a panellist suggested that there should be an amnesty scheme in GST. A former Chief Commissioner, also a panellist was amused - No, No, it's too early for an amnesty scheme under GST. I think it's high time that we do a clean up operation, without waiting for complete chaos and destruction. Let the government be a little kind and issue orders that all the cases pending in all forums, will be treated as decided in favour of the taxpayer. Let us close all this meaningless litigation. Be a little kind to the High Courts, they certainly have better things to decide. Let us start afresh and I am sure the good babus can fill the courts in another three years. Let us do it in a more systematic way.

It should be remembered that the taxpayers of the country did not force the government to bring in GST, it was imposed on them. If there was no GST, this credit would have been available to them; just by overhauling the tax system and bringing a new good and simple tax, you can't deny them what was already theirs. There, certainly, is a better way to get revenue for the government.

Summons to top executives

It has been reported by major newspapers that the DGCI has issued a circular on summons. As per the reports, DGCI has instructed that:

- As an enforcement agency, it is imperative for the DGCI to maintain a balance wherein investigations should proceed strictly, as per law, while simultaneously ensuring that no excesses are meted out to the taxpayers and their sensibilities are respected.
- A summons for personal appearance should only be issued when specifically required and such summons should not be issued repeatedly. Officers should record comprehensive statements in the first instance itself.
- Senior management officials such as CEO, CFO, general managers of a large company or PSU should not generally be issued summons at the first instance unless the evidence suggests otherwise.
- The officers should be sensitive towards the assessee or party and special attention should be given to elderly, women and children present in the premises under search.
- Children should be allowed to go to school, after examining their bags. A woman occupying any premises, to be searched, has the right to withdraw before the search party enters, if according to the customs she does not appear in public. If a person in the premises is not well, a medical practitioner may be called. Religious sentiments of the person under search should not be hurt in any way.

Very lofty indeed!

CBEC had in Circular [F.No 208/122/89-CX.6](#) dated 13.10.1989 observed,

Complaints have been received from the trade that in some of the Collectorates summons under Section 14 of the Central Excises and Salt Act, 1944 are being issued to the Managing Directors and other high officers with a view to enforce recovery of dues which are under dispute. Action under this section is to be taken only as a last resort in cases where assessee are not cooperating or investigations are to be completed expeditiously. This section should not be used for harassing the top management for forcing them to pay up demands which are disputed by them. For recovery of demands normal procedure under the law should be followed.

If any instance of issue of summons to Managing Directors and other Directors without justification is noticed, a serious view will be taken by the Board. Collectors will be held personally responsible for enforcing these instructions in their charges.

That is thirty one years ago.

Thirteen years ago in [F. No. 137/39/2007-CX.4](#) dated 26.2.2007, Board issued some instructions on summons and firmly declared, **A Non-observance of these instructions would be viewed seriously.**

All these years Board had no time to view the indiscriminate summons, let alone view seriously. And all these years, officers have used summons as a power to threaten and harass assesseees. The summons are menacingly and misleadingly worded to instil fear among the assesseees and the summoned persons are made to sit for hours - just to teach them a lesson.

Eight years later, Board issued another guidance in [CBEC Instruction in F. No. 207/07/2014-CX-6., Dated: January 20, 2015](#) that **senior management officials such as CEO, CFO, General Managers of a large company or a PSU should not generally be issued summons at the first instance. They should be summoned only when there are indications in the investigation of their involvement in the decision making process which led to loss of revenue.**

Then, I had written that Board will come up with another circular after ten years. I was wrong, it took them only five and a half years.

Why do they repeat these circulars? Does it mean that the field officers have no respect for the instructions given by the top bosses?

Summons is a duty, not power.

Until next week