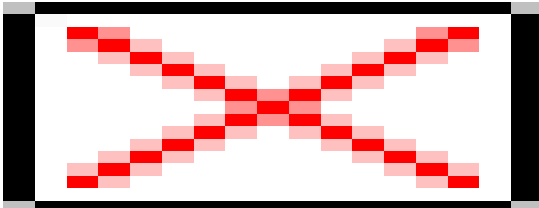


## Reading down s.16(2)(c) of the CGST Act?

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RECENTLY, the Madras High Court in case of *DY Beathel Enterprises v. STO*, -

[2021-TIOL-890-HC-MAD-GST](#)

has caused a stir through its verdict. The High Court set aside recovery of Input Tax credit ('ITC') from buyer where seller defaulted in paying tax to Government. Instant case has gained much needed attention, being first judgement on Section 16(2)(c) of the Central Goods and Services Tax [Act, 2017](#) ('CGST Act') which prescribes that recipient can avail ITC only if tax has been actually paid to Government.

The verdict has surely brought some smile on faces of *bona fide*

taxpayers. However, authors in this article have analyzed whether the benefit of this judgement can be availed by other taxpayers as well, considering the peculiar facts involved.

In this case, the buyer made payment for supply (including GST) to supplier, but supplier failed to remit such GST to Government. The department, however, did not take any recovery action against the supplier but directly issued notice on recipient. The Court, therefore, quashed the orders requiring reversal of ITC from buyer, and remanded the matter back for fresh consideration for following reasons:

- (i) Supplier was not examined; and
- (ii) Recovery action was not initiated against the supplier in first place.

In our view, the judgement is correct inasmuch as it requires department to initiate investigations and recoveries from seller at first instance. However, it must be noted that the High Court's decision is solely based on *Press Release 1* issued by CBIC, which provides that option of recovery of ITC from recipient should only be exercised by revenue in exceptional cases such as missing dealer, closure of business by supplier or supplier not having adequate assets etc. Notably, this press release was issued in respect of new return formats, which were never introduced. Therefore, while the press release lacks legal validity, its reliance showcases Court's interpretation of impugned provision.

At this juncture, though the judgement is in favor of taxpayers, there is an obvious lack of dialogue on several legal grounds, discussed briefly as under:

- (i) Section 16(2)(c) is violative of Article 14 read with Article 19(1)(g) of the Constitution of India, 1950, since it fails to create distinction between *bona fide* and fraudulent taxpayers. Notably, sufficient jurisprudence in favour of taxpayer is also available in erstwhile VAT regime <sup>2</sup>, wherein Courts have held that credit cannot be denied to *bona fide* purchaser if supplier fails to pay tax to Government. While the Petitioner referred to this jurisprudence, the High Court stated that the decisions may not straight away be applicable to GST regime.

(ii) GST when introduced contemplated the concept of GSTR-1, GSTR-2 and GSTR-3, with no possibility of amendment once invoices were accepted by recipient. However, this system was never implemented. There is no mechanism provided under GST law to ensure that non-payment of taxes is communicated to recipient. Hence, taxpayers may take shelter of well accepted judicial Latin principle ' **Lex Non Cogit Ad Impossibilia**' , according to which taxpayer cannot be forced to do something impossible.

(iii) Section 73(1) of the CGST Act imposes burden on person chargeable with tax to show cause as to why he should not pay the same. There are no recovery provisions for recipient.

(iv) It is simply unfair to recover tax from recipient when department has many available statutory avenues to collect tax from actual defaulter i.e. supplier.

In absence of discussion on aforementioned grounds, the instant judgement cannot be said to have read down impugned provision but has only provided relief in cases where investigations have not been initiated on supplier. The constitutional validity of impugned provision basis aforesaid grounds is, however, under challenge <sup>3</sup> and is pending to attain finalization.

Lastly, we wish to highlight that general practice of department in these investigations involves approaching the suppliers first for recording their statements and thereafter, the buyers. Therefore, in such cases, taxpayers will have to challenge the provision itself and will have limited support of this judgement. Hence, taxpayers will have to devise a legal strategy basis their factual matrix, in case demand is raised on them for non-payment of tax by their suppliers.

**[The views expressed are strictly personal.]**

<sup>1</sup> CBIC Press release on

**'GST Council approves principles for filing of new return design based on the recommendations of the Group of Ministers on IT simplification'** dated May 4, 2018 is available at: <http://www.gstcouncil.gov.in/sites/default/files/Press-Dynamic/09%20may.pdf>

<sup>2</sup>**On Quest Merchandising India Private Limited & Arise India Limited v. Government of NCT of Delhi, [2017-TIOL-2251-HC-DEL-VAT](#) (affirmed by Supreme Court)**

<sup>3</sup>**Vij Engineers and Consultants Private Limited. v. Union of India, [2020-TIOL-1323-HC-P&H-GST](#)**

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