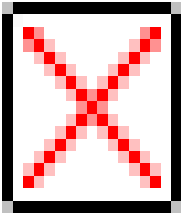


## Status of ITC under GST - whether provisional or final?

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### **SEAMLESS**

flow of Input Tax Credit (ITC) is the backbone of GST Law, as planned at the time of introduction of GST effective from 1st July, 2017. To achieve this objective, the Government has delegated the responsibilities to the Law makers and GSTN Electronic Portal which is also known as Common Portal. According to me, this delegation has been provided purely based on the belief that the seamless flow of tax credit shall happen in three ways:

- 1) Nil or Minimum blocking of ITC
- 2) Hassle free availment and utilization of ITC
- 3) Controlling supplier and recipient accounts in the common portal

In (2) and (3) of the above, provisional and subsequent finalization of ITC plays important role. What's detailed below is my view on whether the planned status of ITC has been achieved or not.

### Nil or Minimum blocking of ITC

1. Section 17(5) of the CGST Act (hereinafter referred to as the Act) blocks ITC of certain supplies like purchasing, renting and leasing of motor vehicles, vessels & air crafts, food supply, beauty treatment, health services, cosmetic and plastic surgery, club membership, leave travel benefits, construction & works contract service used for construction of immovable property (incl. exceptions for all the above) and personal consumption. Almost all the negative list of goods and services of pre-GST Regime have been simply carry forwarded to GST Regime. GST has been planned in India as a new energetic wave merging various traditional levies and procedures into one simplified transparent digitalized system of levy. It is no doubt that GST has merged multiple levies and brought all of them under one umbrella. A very good and bold move in the right direction of tax reform in the country.

2. Having said that, the lawmakers, have continued with the so-called traditional restrictions. For achieving the principle of seamless flow of ITC, it needs to be approached with a young and energetic mind. The seamless flow of credit will happen only when the lawmakers come out of the legacy concept of restriction of tax credit. Until then, it will only remain an un-fulfilled objective.

3. The Department may authoritatively argue that ITC is a form of benefit or concession granted and it is not an accrued property to claim as a vested right for all the tax credits. Hence, it is Government's prerogative to decide the class of eligibility and conditions for availing credit. In support of this argument the Hon'ble Supreme Court decision in the case of ALD Automotive Pvt. Ltd. vs. The Commercial Tax Officer - [2018-TIOL-385-SC-VAT](#) would be relied upon. As a result, the aim of Nil or minimum blockage of ITC has come to a standstill.

#### Hassle free availment & utilization of ITC

4. During the start of implementation of GST, it was planned to have an automated ITC based on invoice level linkage of supplier and recipient account on the common portal. This means, when a supplier files his outward supply details in the Form of GSTR-1 u/s 37 of the Act in the GSTN portal, the same will reflect in the recipients' system in the Form of GSTR-2A. In this GSTR-2A, the recipient has to do edits viz. add or delete or modify based on inward supply records maintained u/s 35 of the Act and prepare his inward supply details in the Form of GSTR-2 as required to be filed u/s 38 of the Act. Edited GSTR-2A will go back to the supplier in the Form of GSTR-1A, which the supplier can accept or reject.

5. Once the taxpayer files his GSTR-1 and GSTR-2, the details of tax payable and ITC taken will flow automatically into the monthly return in the Form of GSTR-3, as required to be filed u/s 39 of the Act. The taxpayer needs to make only payment of tax through Electronic Credit Ledger or Electronic Cash Ledger, as the case may be, at the time of filing monthly return. This plan was an ideal system linked in a digital manner with an automated tax payable and tax credit system coupled with exercising effective control over supplier and recipient accounts in the Electronic Portal GSTN.

6. Due to technical glitches coupled with system failure, this invoice level linkage of supplier and the recipient account on the common portal has failed. As a result, GSTR-2 & GSTR-3 have been kept in abeyance and in place of GSTR-3, a summary return in the Form of GSTR-3B was introduced vide Notification No. [21/2017-C.T.](#) dated 08.08.2017. Initially it was made applicable for July, 2017 & August, 2017 but subsequently extended. For GSTR-3B, details are manually entered based on the accounts/records maintained u/s 35 of the Act.

7. Given no immediate progress in linking invoice level data of a supplier and a recipient and also to nullify the effect of Hon'ble Gujarat High Court Judgment in the case of M/s AAP and Company vs. Union of India - [2019-TIOL-2004-HC-AHM-GST](#), Rule 61(5) of CGST [Rules 2017](#) has been amended retrospectively to say that GSTR-3B is to be treated as a prescribed return u/s 39 of the Act. Hon'ble Gujarat High Court has noted that GSTR-3B Return is not a prescribed return u/s 39 of the Act and it is only a stop-gap arrangement to overcome the difficulty of invoice level linking system. Hence, the time limit for taking ITC as prescribed u/s 16(4) of the Act will not be applicable. This decision was appealed and it is pending before the Hon'ble Supreme Court. However, since the law has been amended retrospectively, automated invoice-wise ITC in GSTR-2 and its auto flow into Electronic Credit Ledger for utilization at the time of filing monthly return has not been achieved.

#### Controlling supplier and recipient accounts in the common portal

8. Upon perusal of the term "**electronic credit ledger**" in the context of "**ITC taking**" as prescribed under the statute, it can be seen that section 2(43) of the Act defines "**electronic credit ledger**" as the electronic credit ledger referred to in sub-section (2) of section 49. According to sub-section (2) of section 49, the input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41 or section 43A to be maintained in such manner as may be prescribed. With reference to this context, the term "**self-assessed**" is very important. As per section 41, every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax credit as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger. Also note that the term "**provisional basis**" plays an important role. In view of the failure of automated credit system as explained above, the procedure u/s 41 of the Act has not been prescribed till date

. Further, the matching provisions planned u/s 42 & 43 of the Act have become mere showpieces leaving the terms '**self-assessment**' and 'provisional basis' almost irrelevant for ITC.

9. Further, it is pertinent to note that with a view to reduce the number of activities, Section 43A has been inserted through the CGST Amendment Act, 2018. It has been intended to merge the three activities into one viz. filing of one monthly return during which time the transactions of GSTR-1, GSTR-2 & GSTR-3B should happen. But, as it stands today, the section is not notified with procedures. In fact, during 42nd GST Council Meeting held on 5th October, 2020 it was accepted there was no improvement as planned u/s 43A and, therefore, a different roadmap by strengthening the existing GSTR-1 & GSTR-3B to provide auto populated data of both liability and ITC was envisioned.

10. In line with 42 nd GST Council Meet, an alternative system of auto credit viz. GSTR-2B has been developed and the trial run is on effective from January, 2021. It is evident that the quest for auto credit and its auto flow into monthly return is still in progress and once the same is stabilized, then matching system u/s 42 & 43 of the Act may be implemented. In the absence of matching provision implementation on the common portal, it is an admitted fact that, at present, there is no provisional credit concept as contemplated u/s 41 of the Act. In the absence of procedures for provisional and finalization of self-assessed ITC taken, whether a taxpayer can claim that the ITC taken is final?

#### In parting

Going by the above discussion, one can definitely claim that the self-assessed ITC taken into the Electronic credit ledger for utilisation at the time of filing monthly return is final. As fake invoice credits have been unearthed in large number of cases, the claim of final credit by honest taxpayers may not be accepted by the Department. It is high time the GSTN portal acts effectively with a fool-proof system of invoice-wise matching of supplier and recipient accounts on the common portal itself as well as automated ITC and its flow into Electronic Credit Ledger, while filing monthly return GSTR-3B. Common portal should reconcile accounts of supplier and recipient and alert the deficiency, if any. It is only then that the status of ITC taken would get a clear recognition - i.e. whether it is to be considered provisional or final.

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

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