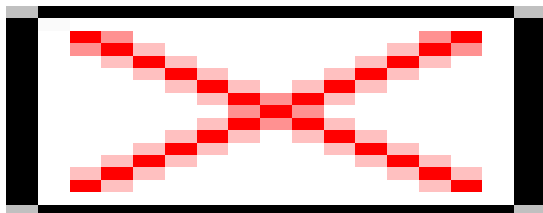


Is liability shift on account of non-payment of GST by suppliers ultra vires?

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entire mechanism of Input Tax Credit (ITC) is the backbone of GST and the statute grants ITC upon fulfilment of certain conditions. Clause (c) of Section 16(2) lays down one critical condition of payment of GST by the supplier to the Government in order to make the recipient eligible for ITC. This condition was subject to the rigours of Section 41 which originally provided for grant of self-assessed ITC on provisional basis subject to matching mechanism. The mechanism for system-based matching of ITC was designed to be carried out by filing of Form GSTR 1, Form GSTR 2 and Form GSTR 3, however, the same could never be brought into force. Later, Section 16(2)(c) was made subject to Section 43A vide CGST Amendment Act, 2018 but the same was never notified.

From inception of GST, Section 16(2)(c) has been used as a tool by the department for denying, otherwise eligible ITC, to the recipient on account of non-payment of GST by defaulting suppliers. Some of the taxpayers reversed their ITC whereas others contested the demands on several grounds such as absence of system-based mis-match validation, no other means available to verify whether the tax has been deposited by the supplier and no onus on the recipient to ensure payment by supplier etc. The Hon'ble Madras High Court in the case of *M/s.D.Y.Beathel Enterprises, [W.P.(MD)No.2127 of 2021]* - [2021-TIOL-890-HC-MAD-GST](#)

quashed the order for recovery of ITC against the petitioner and remanded the matter back to the respondent State Tax Officer on the ground that inquiry for non-payment of tax should have been initiated against the supplier in the first place.

Section 41 was overhauled completely and Section 43A was omitted vide Finance Act, 2022. The substituted Section 41 with effect from 1st October 2022 provides that registered person shall be entitled to avail self-assessed ITC. However, ITC availed in respect of such supplies, tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest in the prescribed manner. It also provides where the said supplier makes payment of the tax payable in respect of the aforesaid supplies, the registered person may re-avail the amount of ITC reversed by him, in the prescribed manner.

As an outcome of the recent 48th GST Council meeting, certain changes have been made in CGST Rules. A new rule 37A has been inserted in the rules with effect from 26th December 2022 to provide for the manner of reversal and re-availment of ITC as contemplated by Section 41. It provides where ITC in respect of invoice or debit note has been availed, the details of which have been furnished by supplier in GSTR-1 but his GSTR-3B for corresponding tax period has not been furnished till 30th September of following financial year (FY) in which ITC in respect of such invoice or debit note has been availed, the said amount of ITC shall be reversed in GSTR-3B on or before 30th day of November following the end of such FY. The first proviso to the rule states that where said amount of ITC is not reversed by 30th day of November following the end of FY, such amount shall be payable by the said person along with interest thereon under Section 50. If supplier subsequently furnishes GSTR-3B for the said tax period, the recipient may re-avail the amount of such ITC for a tax period thereafter.

Perusal of Section 41 with newly inserted Rule 37A raises a doubt whether this rule has gone beyond the parent Act. A careful reading of Section 41 of the Act would reveal that the provision has contemplated reversal of ITC in respect of identified supplies of goods or services in respect of which tax has not been paid by the suppliers, in prescribed manner. The Act further allows re-availment of ITC upon payment of tax by the suppliers in respect of stated supplies. Therefore, it is clear that non-payment of tax by suppliers will have to be identified at supply/invoice level. However, Rule 37A has proceeded with at return level default. Take an example wherein the supplier has forgot to upload particular invoice details in GSTR-1 of January but discharged tax through Form GSTR-3B for January in order to avoid any interest implications. Thereafter, the supplier corrected his mistake by uploading details of the said invoice in Form GSTR-1 of February but could not file Form GSTR-3B for the said month. Now if the procedure laid down in Rule 37A is followed, the recipient would be required to reverse ITC

by 30th November of the succeeding FY, which was availed by him in his Form GSTR-3B of February because the supplier never filed GSTR-3B for February corresponding to Form GSTR-1 which contains the details of this invoice. Non-reversal of ITC beyond this date would even attract interest. The dichotomy here is that the rule may disallow ITC in respect of a tax paid supply which was never contemplated by Section 41. This is just one example and there could be several other instances wherein the Rule would trigger reversal of ITC wherein the same was not contemplated by the Act. There is a settled principle of law that the Rule must yield to the Act. If a Rule goes beyond what the Act contemplates or is in conflict thereof, it becomes ultra vires the parent Act. In the above example, even if Form GSTR-3B of February is filed by the supplier, it would not necessarily imply that payment of tax for the stated invoice has been made. Form GSTR-3B can be filed with part payment of taxes and is not indicative of the fact whether tax has been paid on particular supply of goods or services. Therefore, one may always contend that Section 16(2)(c) which is subject to the rigours of Section 41, cannot be made workable unless the law prescribes an invoice level matching mechanism. There is a legal proposition based on the maxim "***Expressio unius est exclusio alterius***", meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.

Further, the onus for compliance is on the recipient. The recipient would be required to keep a check on the filing status of Form GSTR-3B of the defaulting suppliers for ever, unless the default is made good by such supplier.

It may be noted that rule provides that ITC can be re-availed once the supplier subsequently furnishes GSTR-3B for the said tax period, however, the provision does not provide for re-avilment or refund of the interest component paid by the recipient. Here, the department would collect interest from the supplier also due to delayed payment of tax component. Keeping in mind the compensatory nature of interest, the question would arise whether the concept of unjust enrichment can be applied on the department as well wherein the department is doubly enriching itself by collecting interest from both ends i.e. the supplier and the recipient.

Rule 37A provides for payment of interest under Section 50 of the Act. Section 50 read with Rule 88B would require payment of interest in case of wrongly availed and utilized ITC to be computed from the date of utilization whereas Rule 37A requires payment of interest in case ITC is not reversed in GSTR-3B on or before the 30th November following the end of FY during which such ITC was availed. Therefore, a question would arise whether interest could be levied for a period prior to 30th November even if it was rightfully availed at that time in case it had already been utilized by that date.

Further, it seems that extended time limit would be available to make good the default made by supplier in those cases where ITC has been availed by the recipient in the next FY by 30th November succeeding the FY to which such invoice pertains. Take an example wherein the recipient availed ITC of January 2022 invoice in Form GSTR-3B of January 2022. Assuming that the supplier furnished Form GSTR-1 in January 2022 but did not file Form GSTR-3B for January 2022 by September 2022. In such a case, ITC will have to be reversed by recipient by 30th November 2022. Take another example where the recipient has missed to avail ITC in the month of January 2022 and availed the same in the month of September 2022, then the ITC reversal would be required by 30th November 2023 if Form GSTR-3B for the said month is not filed by the supplier by 30th September 2023 for the reason that the relevant FY in such cases would be 2022-23 in which ITC is availed by the recipient. There seems to be an anomaly in the rule, which is required to be corrected at the earliest, as it may indirectly extend the deadline for reversing ITC.

One more point which needs clarification is whether the new mechanism of reversal and re-avilment of ITC would be applicable for future invoices or even the past invoices issued prior to 26th December 2022 when Rule 37A came into force.

The above changes made to the CGST Rules might result in unwarranted litigation. Therefore, suitable clarification is crucial from Central Board of Indirect Taxes to avoid any potential litigation in GST.

[The views expressed are strictly personal.]

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