

REPLY TO NOTICE FOR MISMATCH IN ITC AS PER GSTR 3B, GSTR 9 AND GSTR 2A U/S 16, 73

To,

The Deputy Commissioner of State Tax

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Dear Sir,

Reg.:..... **GST No.**

Subject : Submission in pursuance to notice dated.....u/s. 73 & DRC-1 dated.....for the financial year 2018 – 2019

With reference to above captioned subject, we state as under. The company is in receipt of show-cause notice dated..... u/s. 73 & DRC-1 dated for the financial year 2018-2019 wherein the selection is based on parameter 0073 i.e. Excess ITC claimed in GSTR9/3B, which is not confirmed in GSTR2A or 8A of GSTR9 amounting to Rs...../-.

In pursuance to above, the Company makes the following submissions:

ELIGIBILITY & CONDITIONS FOR CLAIMING INPUT TAX CREDIT.

Under Section 16 of CGST Act, 2017 prescribes the eligibility and conditions for claiming input tax credit. U/S. 16(1) entitles every registered person to take credit input tax credit, subject to under section 49, on both goods and services used in the furtherance of his business.

Further under Section 16(2), prescribed the condition to be fulfilled by the registered person to take the credit of input tax credit. Provisions of under Section 16(2) are reiterated herein for ready reference.

“(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless–

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation - For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services–

(i) Where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) Where the services are provided by the supplier to any person on the direction of and on account of such registered person.

(c) subject to the provisions of U/S. 41 or 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment.

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed :

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

It can be observed from above, primary conditions as stipulated in U/S.16(2) to avail input tax credit are as under:

1. Registered person shall be in possession of invoice or debit note raised by the supplier.
2. Registered person should have received goods or services or both.
3. Subject to provision of U/S. 41 or U/S. 43A, the tax charged in respect of such supply has been actually paid to the Government.
4. Registered person has furnished the return U/S. 39.

ORIGINAL PROCESS OF MATCHING, REVERSAL AND RECLAIM OF INPUT TAX CREDIT U/S. 42 HAS NEVER BEEN IMPLEMENTED AND RELEVANT SECTION HAS BEEN KEPT IN ABEYANCE

U/S. 41 of the CGST Act entitles every registered person to take credit of eligible input tax, as self-assesses, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger. Further such provisional credit becomes final after matching, reversal and reclaim of input tax credit as envisage in U/S. 42 of the CGST Act.

Provision of U/S. 42 are reproduced below for ready reference.

- (1) The details of every inward supply furnished by a registered person (hereafter in this section referred to as the "recipient") for a tax period shall, in such manner and within such time as may be prescribed, be matched—
- (2) The claim of input tax credit in respect of invoices or debit notes relating to inward supply that match with the details of corresponding outward supply or with the integrated goods and services tax paid under section 3 of the Customs Tariff Act, 1975 (51 of 1975) in respect of goods imported by him shall be finally accepted and such acceptance shall be communicated, in such manner as may be prescribed, to the recipient.
- (3) Where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the 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 in such manner as may be prescribed.
- (4) The duplication of claims of input tax credit shall be communicated to the recipient in such manner as may be prescribed.
- (5) The amount in respect of which any discrepancy is communicated under sub-section (3) and 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 such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated.

(6) The amount claimed as input tax credit that is found to be in excess on account of duplication of claims shall be added to the output tax liability of the recipient in his return for the month in which the duplication is communicated.

(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.

(8) A recipient in whose output tax liability any amount has been added under sub-section (5) or sub-section (6), shall be liable to pay interest at the rate specified under sub-section (1) of section 50 on the amount so added from the date of availing of credit till the corresponding additions are made under the said sub-sections.

(9) Where any reduction in output tax liability is accepted under sub-section (7), the interest paid under sub-section (8) shall be refunded to the recipient by crediting the amount in the corresponding head of his electronic cash ledger in such manner as may be prescribed:

Provided that the amount of interest to be credited in any case shall not exceed the amount of interest paid by the supplier.

(10) The amount reduced from the output tax liability in contravention of the provisions of sub-section (7) shall be added to the output tax liability of the recipient in his return for the month in which such contravention takes place and such recipient shall be liable to pay interest on the amount so added at the rate specified in sub-section (3) of section 50.

It can be observed from above U/S. 42(3), in case of difference in input tax credit claimed by the recipient and tax declared by the supplier or in case where the outward supply is not declared by the supplier in his return. Such difference shall be communicated to both recipient as well as supplier in prescribed manner.

Further as per U/S. 42(5), where discrepancy is communicated under sub – section (3) and which is not rectified by the supplier, such amount should added to the output tax liability of the recipient in his return for month the succeeding the month in which the discrepancy was communicated.

Further, mechanism for matching, reversal and reclaim of input tax credit as envisages in U/S. 42 is laid down in rule no. 69, 70 & 71 of the Central Goods and Service Tax Rules, 2017.

As per rule 71 (1), discrepancy in the claim of input tax credit as specified in U/S. 42(3) and details of amount to be added in output tax liability as per U/S. 42(5) should be communicated to recipient of inward supply in form GST MIS -1 and to the supplier of outward supply in form GST MIS – 2 on or before the last date of the month in which matching has been carried out.

Further as per sub-rule (2) & (3) of rule 71, the supplier and recipient may make the suitable rectification in statement of outward supply and inward supply.

In case where discrepancy is not rectified as per r. 71(2) or R. 71(3), as per r.71(4), the amount to the extent of discrepancy not rectified shall be added to the output tax liability of the recipient in his GSTR 3 for the month succeeding the month in which discrepancy is made available

It can be seen from above, specific mechanism for matching, reversal and reclaim of input tax credit has been laid down under the GST laws. However, this complete mechanism for matching, reversal and reclaim of input tax credit as originally envisaged under GST laws has never been implemented and kept in abeyance.

Further provision of U/S. 16(2)(c) w.r.t to condition of payment of taxes to Government is subject to U/S. 43A of CGST Act. U/S. 43A, inserted by Central Goods and Services Tax (Amendment) Act, 2018, lays down procedure for furnishing of return and availing input tax credit. However, U/S. 43A was never notified and omitted by Finance Act, 2022 from the date yet to be notified.

In absence of implementation of mechanism for matching, reversal and reclaim of input tax credit as originally envisaged in GST law, the recipient of inward supply were required to claim eligible input tax credit in accordance with U/S. 41 i.e on self- assessment method irrespective of such input tax credit being reflected in GSTR 2A or not.

Also, as per press release dated 04th May 2018 of 27th Meeting of GST council it was stated that there shall not be any automatic reversal of input tax credit from the buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.

In support of its above contention, the Company relies on decision of Madras High Court in case of **M/s. D. Y. Beathel Enterprises Vs. State Tax Officer (W.P(MD) no. 2127 of 2021** wherein it was held that if the default is made by non – payment of tax by seller, the recovery shall be made from seller and only in exceptional cases, it can be made from recipient. Therefore, the input tax credit claimed by recipient cannot be denied for the reason that seller has not uploaded the invoice.

INPUT TAX CREDIT U/S 16(2)(C) SHOULD NOT BE REVERSED UNLESS COLLUSION BETWEEN BUYER & SELLER

With onset of GST, it was enacted that ITC would auto-populate in GSTR 2A on basis of sales summary filed by supplier in its return GSTR 1. Whole mechanism for matching, reversal and reclaim of Input Tax credit as per U/S.42 has never been implemented and relevant section has been kept in abeyance. Without having any system available to recipient of input tax credit, it is unreasonable to ask recipient to do the impossible of ensuring supplier deposit the tax with Government.

U/S. 16(2)(c) punishes the recipient for fault of supplier, even in absence of any collusion between the two. In erstwhile VAT regime, there are various judgment states that only in case of collusion between the recipient and supplier, input tax credit shall denied.

Punjab & Haryana High Court in case of **Geru Lal Bal Chand Vs. State of Haryana** has held that “In legal jurisprudence, the liability can be fastened on a person who either acts fraudulently or has been a party to collusion or connivance with offender. However, law nowhere envisages to impose any penalty either directly or vicariously where person is not connected with any such event or an act. Law cannot envisage an almost impossible event.

Also, Karnataka High Court in **M/s Onyx Designs** held that “the benefit of input tax cannot be deprived to the purchaser dealer, if the purchase dealer satisfactorily demonstrates that while purchasing goods, he has paid amount of tax to the selling dealer. If the selling dealer has not deposited the amount of tax in full or part thereof, it would be for the revenue to proceed against the seller..

Delhi High Court in case of On Quest **Merchandising India P. Ltd vs. Government of NCT of Delhi & Ors** has held that that the Department is precluded from invoking Under Section 9 (2) (g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC. Where, however, the Department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the Department can proceed under Section 40A of the DVAT Act.

Based on the above discussion, the Company states that provisions of S. 16(2)(c) can be invoked only in case where recipient and supplier are working in collusion because in such cases the recipient steps into the shoes of supplier and input tax credit can be denied in such cases and not otherwise.

DOCTRINE OF IMPOSSIBILITY

Company humbly submits that, as per U/S. 16(2)(c), input tax credit cannot be denied on the ground of mismatch of input tax credit as claimed in GSTR3B/GSTR9 and GSTR 2A in absence of implementation of the mechanism as laid down in GST Law. Post the transaction of supply and payment thereof by the recipient, it has no control over the supplier. By casting the onus on recipient to ensure that declaration of transaction in its return and payment of tax on same, without any mechanism available to him, is asking him to do the impossible.

Company would like to draw attention of your good self on legal maxim *lex non cogit ad impossibilia*. This maxim postulates that law cannot compel a man to do that which cannot possibly be performed. This principle has been upheld in catena of judicial pronouncements

In **State of Rajasthan vs. Shamsheer Singh (1985 AIR 1082)** it was argued before the Hon'ble Apex Court that however mandatory the provision may be, where it is impossible of compliance that would be sufficient excuse for non-compliance

The Supreme Court in the case of **State of MP Vs. Narmada Bachao Andolan** applied this maxim and held that thus, where the law creates a duty or a charge and the party is disabled to perform it without any fault on his part and has no control over it, the law will in general excuse him.

Delhi High Court in the case of **Arise India Ltd. V. Commissioner of Trade and Taxes**, has held that in the present case, the purchasing dealer is being asked to do the impossible, i.e. to anticipate the selling dealer who will not deposit with the Government the tax collected by him from those purchasing dealer and therefore avoid transacting with such selling dealers. Therefore, there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not to punish bona fide purchasing dealers. The latter cannot be expected to do the impossible. It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.

Allahabad High Court in the case of **Commissioner of Income Tax vs. Premkumar**, while dealing with the question whether an assessee can be faulted for not declaring the amount of capital gain on acquisition of land when the amount of compensation itself is not determined held that requiring the assessee to file a proper and complete return by including the income under the head 'Capital gain' would be impossible for the assessee in such cases.

Madras High Court in case of **CIT V. Revathi Equipment Ltd.**, while dealing with question as to whether an assessee can be held liable to pay interest for failure to pay advance tax during the year when the liability to pay tax had arisen on account of amendment to law which took place after the end of the year, held that the assessee was not liable to pay advance tax and therefore levy of interest under sections 234B and 234C is not justified.

Company humbly submits that similar provision in VAT regime was struck down by various courts. Also, constitutional validity of S.16(2)(c) is challenge before various High Court. Based on the discussion above, in absence of any mechanism as originally envisages in GST laws, it is impossible for Company to ensure that supplier discloses the transaction of sale in GSTR1 and deposit taxes on same in Government treasury.

Actual Mismatch between input tax credit claimed in GSTR3B/GSTR9 vis-à-vis GSTR 2A is Rs...../- instead of Rs.....as mentioned in notice u/s. 73 of CGST Act.

Without prejudice to stated above, Company humbly submit that the actual mismatch between input tax credit claimed in GSTR3B/GSTR9 vis-à-vis GSTR 2A is Rs...../- and not Rs./- as mentioned in notice u/s 73 issued on..... Company hereby submits the reconciliation between input tax credit as claimed in GSTR 9 and input tax credit as per GSTR 2A

It can be pursued from above reconciliation, mis-match in input tax credit as claimed in GSTR 9 and reflected in GSTR 2A is Rs..... /- and not Rs...../-

Based on the above submission and discussion, Company humbly submits that the provisions & procedure as laid down in rules for matching, reversal and reclaim of input tax credit, as originally envisaged in GST laws, was kept in abeyance, and never implemented. In absence of any mechanism for matching of input tax credit, it is impossible for the Company to ensure the disclosure of transaction by supplier of supply in its GST return and ensure deposit of taxes into government treasury. Company humbly submits that it has fulfilled eligibility and conditions as laid down in section 16 for claim of input tax credit. Company states that it is in possession of tax invoices issued by supplier; has received goods or services or both in respect of input tax credit claimed; it has paid the amount of tax charged on invoices by supplier and has also filed its GST returns. Company requests you to please not deny the input tax credit as claimed in return.

Company requests you to please take the above in your records. In case of any additional requirement, we request you to let us know the same, company shall be obliged to submit the same.

Thanking You.

Yours Faithfully

For

Authorised Signatory

Dated