

MONTHLY NEWSLETTER

# GST TRACKER

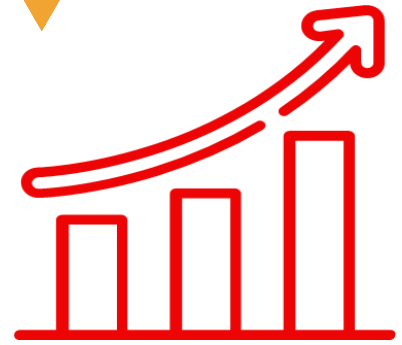
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# DATA



Business



# INSIGHTS

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# EDITOR'S NOTE

## *Journey*

With December, we are about to end our journey for the year 2021 and begin our journey towards 2022. The year had been full of challenges and possibilities to find solution to come out of the extraordinary situation posed by Covid-19.

Year 2022, we hope all our hardships will yield results and we will see the world with a ray of good health, wealth, growth and prosperity.

*Pankaj Kataria*

(Founder Pakkabil)



# LABYRINTH of INPUT TAX CREDIT UNDER GST

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CA (Adv) Aanchal Kapoor  
FCA, LLB, B. Com

“Input Tax Credit”, the basis for bringing up India’s biggest Indirect Tax Reform to eliminate cascading effect of taxes and promote Seamless Credit, seems to be lost in light of multiple hurdles in form of

- Litmus test of Section 16,
- Section 16(4) time limits,
- Mischievous Rule 36(4),
- Mysterious GSTR 2A/2B,
- Blocking of credit as per Section 17(5),
- Rule 86A(Blockage of Credit),
- Rule 86B(1% Cash payment),
- Reversals owing to 180 days condition,
- Reversals pertaining to Rule 42/43,
- ITC restrictions through Rate Notifications,
- Broken limbs in form of GSTR 2 in absentia,
- GSTR3B as proxy to GSTR 3,

This article analyses the issue of entitlement to ITC in GST where Tax has not been deposited by the seller w.r.t Sec 16(2)(c).

## ISSUE

Is registered person entitled to take Input Tax Credit of Invoices where Tax has not been deposited by the Seller (Section 16(2)(c))?

## Anatomy of the Provisions

- Section 16(2)(c) of the CGST Act puts restriction on the entitlement to the credit of any input tax unless subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and

Section 16(2)(c) entitles the Buyer to claim the input tax credit when the tax paid on purchases made by him is **actually paid** to the exchequer of the Government by the Seller either through cash or admissible credit. It is one of the **nightmare provisions of the GST laws for the Tax compliant persons**, especially when the Purchaser has **no control over seller** to ensure that such tax is deposited with revenue. Does this provision hold good in light of the facts that Purchaser is without any legal authority to ensure this compliance by the seller and **missing Matching Concept** which had been envisaged as the backbone of GST by the lawmakers. Imagine, the buyer must not only examine the products before purchasing but also beware of the tax compliances of the vendors from whom it is procuring the goods or availing the services.

- Lex non cogit ad impossibilia (law does not compel a man to do that which he cannot possibly perform) and impossibilium nulla obligatio est (law does not expect a party to do the impossible) are well known maxims in law and would squarely apply to the present case. The onus that section 16(2)(c) puts on the buyer is almost impossible to perform. If the buyer has acted bonafide, prima facie there are no grey areas in a transaction and the buyer has paid the tax to the seller, the buyer should be absolved of his responsibilities to ensure that the tax has been paid to the government. If the seller fails to do it, it is the duty of the tax enforcement machinery, which has the required financial resources, manpower and legal authority, to track the errant seller and realise the same from him. The seller himself is a government representative, stepping in its shoes, when he has been given the Registration by the Department itself and the responsibility to deposit the tax after collection from purchaser has been cast on his shoulders. The restrictions put in section 16(2)(c) in respect of purchasing dealer are arbitrary, irrational and unduly harsh. It is tantamount to violation of Article 14 of the

constitution. Article 14 talks about equality before law and states that the State shall not deny any person equality before the law or the equal protection of the laws within the territory of India.

- Reference can be made to Pre GST jurisprudence in case of past decisions like **M/s Kay Kay Industries(SC) ((2013-TIOL-41-SC-(X))**, Arise India .Ltd (Delhi HCTS-314-HC-2017), On Quest Merchandising India Pvt. Ltd. (DHCW.P. (C) No. 6093/2017 dated 26.10.2017), GheruLalBal Chand(P&H45 VST 195), Sri Vinayaga Agencies vs. Asst. Comm. Vadapalani&Ors. (2013) 60 VST 283 (Mad), Infiniti Wholesale Ltd.(2015) 55 taxmann.com 64 (Madras), Althaf Shoes (P) Ltd.(2012) 50 VST 179 (Mad.), Shanti Kiran India Pvt. Ltd. Vs. Commissioner, Trade & Tax Department (2013) 57 VST 405 (Del. HC), Britannia India Ltd. (MHC2016-TIOL489-HC-MAD-VAT), L & T vs CCE (2001-127-ELT-807),Jharkhand High Court in the case of Tarapore& Co vs CCT 2020 (1) TMI 414 (Jhar).
- IN **GST regime** also,relief to some extent has been provided in case of

**1) 2021 (3) TMI 1020 – [MADRAS] M/S. D.Y. BEATHEL ENTERPRISES**

where it has been held that when it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him. That apart in the enquiry in question, **the Person who supplied / sold the goods, ought to have been examined.**

2) In case of Bharat Aluminium Company Ltd vs. Union of India Ors. [2021] 128 taxmann.com 11Hon'ble Chhattisgarh High Court has admitted the hearing and granted ad-interim relief on issue of denying ITC to the Petitioner, on the basis of mis-matching of ITC availed in Form GSTR-3B with the details furnished by suppliers in Form GSTR-2A for the period 2018-19.

3) Sahil Enterprises v. Union of India - [2021] 129 taxmann.com 233 (TRIPURA) The petitioner filed writ petition and challenged the vires of Section 16(2)(c) being violative of Articles 14, 19(1)(g) and 300A of the Constitution of India. The Honorable High Court noted that with respect to

certain purchases made by the petitioner from another registered dealer after paying full taxes, the selling dealer has not deposited the tax with the Government. The department therefore, put petitioner's input tax credit account under attachment. Since, this issue would require consideration and legislation framed by the Parliament is under challenge, notice is issued to the Attorney General.

4) Apart from above, the **Writ petitions challenging constitutional validity** and vires of the Section 16(2)(c) of the CGST Act have been filed before the High Courts in the case of **(a) LGW Ind Ltd vs UOI 2020- VIL-726-CAL (b) M/s Shree Gobind Alloys Pvt. Ltd. Vs. Union of India and others in Orissa High Court dated 05.05.2021 (c) M/S Surat Mercantile Association & 5 Others Versus Union Of India & 2 Others - 2021-VIL-781-GUJ** The High Courts have admitted the petitions and issued notices to the Government.

**5) Clause (iv) of Press Release Dated 04-05-2018:** No automatic reversal of credit: There shall not be any automatic reversal of input tax credit from 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.

## **Denouement Question 1**

The Rule of Law is "**No Innocent person should be punished**", which seems to lose relevance in light of provisions of Sec 16(2)(c). It has been held that no Liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling dealer in the treasury, unless it is fraudulent, or collusion or connivance with the registered selling dealer or its predecessors with the purchasing registered dealer are established. ITC should not be denied to the bonafide purchasing dealer merely on fault of selling dealer.



## **EPILOGUE**

As per the above draconian provisions the very essence of GST seems regarding Seamless flow of credit seems to be lost and is a betrayal of the legitimate expectations. Fight and resistance is the call of the day. It's a weird world. The sooner the stakeholders adversely affected by it fight it, tooth and nail and ensure it is struck down, the better. However, till such crippled provisions gets a clear pronouncement, it will always keep the taxpayers on tenterhooks as he would be perennially in a state of uncertainty whether the ITC would become due to him or not.

## GSTN updates November 2021

Date of Issue	Subject
26/11/2021	Improvements in GSTR-1

Source: [www.gst.gov.in](http://www.gst.gov.in)

## Notifications/Circulars/Orders issued in the month of November 2021

Ø Central Tax Notifications November 2021

No Central Tax Notification was issued in the month November 2021

Ø Central Tax (Rate) Notifications November 2021

Notification Nos.	Date of Issue	Subject
14/2021	18/11/2021	Seeks to further amend notification No. 01/2017-Central Tax (Rate) dated 28-06-2017
15/2021	18/11/2021	Seeks to amend Notification No 11/2017-Central Tax (Rate) dated 28.06.2017.
16/2021	18/11/2021	Seeks to amend Notification No 12/2017-Central Tax (Rate) dated 28.06.2017.
17/2021	18/11/2021	Seeks to amend Notification No 17/2017-Central Tax (Rate) dated 28.06.2017

Ø Integrated Tax Notifications November 2021

No Integrated Tax Notification was issued in the month November 2021

## Ø Integrated Tax Notifications November 2021

Notification Nos.	Date of Issue	Subject
14/2021	18/11/2021	Seeks to further amend notification No. 01/2017-Integrated Tax (Rate) dated 28-06-2017
15/2021	18/11/2021	Seeks to amend Notification No 8/2017-Integrated Tax (Rate) dated 28.06.2017.
16/2021	18/11/2021	Seeks to amend Notification No 9/2017-Integrated Tax (Rate) dated 28.06.2017
17/2021	18/11/2021	Seeks to amend Notification No 14/2017-Integrated Tax (Rate) dated 28.06.2017.

## Circular issued in the month of November 2021

Circular Nos.	Date of Issue	Subject
165/21/2021-GST	17/11/2021	Clarification in respect of applicability of Dynamic Quick Response (QR) Code on B2C invoices and compliance of notification 14/2020- Central Tax dated 21st March, 2020
166/22/2021-GST	17/11/2021	Circular on Clarification on refund related issues

### Ø Orders

No Orders issued in the month of November 2021

### Ø Removal of Difficulty Orders November 2021

No order was issued in the month of November 2021

Source: [www.cbic.gov.in](http://www.cbic.gov.in)

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