

## GST ARTICLE

### Gaps in the statute - Giving ITC where it's due

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We are close to 4 years since the groundbreaking legislation changed the whole landscape of indirect taxes in India. But, the GST law is far from perfect and the anomalies become more apparent as the days go by. The legislation at the outset had numerous gaps, and the numerous amendments have played their part in increasing those gaps.

An acute situation is where the taxpayer is able to satisfy the material conditions of availing Input Tax Credit (ITC) on one or the other inward supplies but is unable to avail either **because the procedure is dichotomous or the procedure is not there at all due to "the gaps in the statute"**.

#### **Cenvat Credit available *dehors* gaps in statute**

In a recent decision the Hon'ble Delhi CESTAT in Mammon Concast Pvt. Limited vs Commissioner of CGST - [2021-VIL-247-CESTAT-DEL-ST](#), in the context of Central Excise Rules, has held that where the manufacturer-appellant bought the goods on high seas, and even when the duty paying documents were in the name of original importer, then also the appellant is eligible to take Cenvat Credit of the CVD/ SAD.

Further, the Cenvat Credit was also held to be eligible on the service tax charged by service providers, even though the invoice was issued by the service providers on the intermediary, who subsequently claimed reimbursements from the appellant. In the words of the CESTAT "**credit cannot be denied for some gaps left in statute**".

The view taken by the Tribunal follows the bulk of decisions, wherein the Cenvat Credit was allowed *sans* claimant satisfying procedural conditions such as invoices in the name of employees, invoice particulars not clear, duplicate invoices, endorsed invoice, etc. Notwithstanding which all conditions are substantial or procedural, **the views of the Courts are unanimously clear that the procedural conditions do not curtail substantial benefit including the tax credit on inputs.**

### **Filing the gaps in deserving cases**

The Courts in most occasions refrain from supplying the gaps (*casus omisus*), but **when a yawning gap in the Statute, in the considered view of the Court, calls for temporary patchwork of filling up to make the statute effective and workable and to sub-serve societal interests a process of judicial interpretation would become inevitable** [Ritesh Singh vs State of Uttar Pradesh 2019 SCCOnline SC 956].

If the Rules are mandatory and the assessee did not comply, he would not be entitled to claim the Cenvat credit. If however, the said Rules are directory, based on substantial compliance of the same by the assessee, no prejudice is shown to the revenue and then, the assessee would be entitled to avail Cenvat Credit [Sri Ram Pistons & Rings, [2017-VIL-689-ALH-CE](#)]

**Gaps in the GST legislation:** There are numerous examples of such glaring gaps under GST, to illustrate a few;

**Import IGST paid post-facto:** There are numerous situations where the Import IGST is paid after the assessment, such as IGST paid upon regularization of advance authorization/ EPCG, IGST paid in pursuance of SVB re-assessment, de-bonding on account of wasting norms, payment in pursuance of withdrawal of exemption, where the tax is paid discharged through challans.

[Rules 36 \(1\) \(d\)](#) specifies duty paid document for import either a bill of entry or a similar document provided under the Customs Act, 1962 for assessment.

Essentially, under the Customs Act, the re-assessment is either through amendment [Section 149] or through appeal [Section 28, cue ITC Limited - [2019-VIL-32-SC-CU](#)]. So this leaves a gap in as much as IGST paid in situations covered above are not backed by 'specified' duty paying document.

**Expenses via reimbursements:** The customs intermediaries who work under agency model procures services (transportation, handling, storage) on behalf of the importer/ exporter. Number of times, due to oversight, the invoices issued by the actual service providers either do not comply with invoice content requirements or are not uploaded in their Form GSTR-1 along with GSTIN of the importer/ exporter. This can happen literally with all aggregators, leaving the importer/ exporter with ITC, but without proper duty paying document.

**Endorsed invoices/ Invoices in the name of employees:** The organization that want to claim ITC on travel costs/ hotels have made it mandatory for employees to book airlines/ hotels through the shared portal or through specified agencies. Why? Because employees in their regular course expend on behalf of the organization, but the vendors (in most of the cases) issues invoices in the name of employees. Additionally, there are numerous examples, where the invoices are endorsed by one unit of the organization to another organization.

**Jointly procured assets/ services:** In rare cases, the organizations incur shared costs for buying/ procuring shared goods/ services [generators, transformer, other utilities]. In most cases, the service providers/ sellers of common utilities are government agencies, who are not interested in issuing separate invoices for the individual recipients. Leaving the recipients, with inability to claim ITC on the basis of one common invoice?

**ICAI not uploading invoices:** The ICAI on the offshoot of GST didn't collect GST on the annual membership fees collected from the members but asked the members to deposit the GST somewhere in Oct/ Nov2017. The members complied happily [☺]. But the tax was not reported in Form GSTR-1 by ICAI and

consequently didn't followed in Form GSTR 2A of the members. Should the members have availed ITC of the GST charged by ICAI? [potential ITC of more than 3 Crore  $70,000 * 2500 * 18\%$ ]

### **Conclusion**

All the above situations and many others have either resulted in the organizations unnecessary waiving of their rightful claims (where they have not claimed ITC) and for others, who have availed are bound to face objections from the revenue authorities.

It's not those dreaded battles like ineligibility on material conditions, it's those irritating things that one has the least control over. The revenue authorities time and again exploit the gaps left by the statute and propose tax demands. But, the decision of the Hon'ble Tribunal in Mammon Concast *supra* would facilitate those who have availed ITC in contesting their claim.

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