



UNION BUDGET 2023
DECODING INDIRECT TAX PROPOSALS



ANANTHAM LEGAL
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ITC reversal upon non-payment of consideration [*Second Proviso to Section 16(2) of CGST Act*]

The Finance Bill, 2023 ('Finance Bill') proposes to amend the second proviso to Section 16(2) to Central Goods and Services Tax Act, 2017 providing for reversal of input tax credit ('ITC') by a recipient taxpayer who fails to pay to the supplier taxpayer the value of supply along with tax thereon within 180 days from the date of invoice. The provision currently requires addition of ITC availed to the output tax liability and payment of applicable interest thereon.

The proposed amendment provides for payment of ITC by the recipient taxpayer along with interest as per Section 50 of the CGST Act.

Our Comments

Table 3.1 of Form GSTR-3B provides for 'details of outward supplies and inward supplies liable to reverse charge'. The various rows for details of outward supplies deal with outward taxable supplies, zero rated supplies, nil rated / exempt supplies and non-GST supplies. There is no option to add the ITC required to be reversed under the proviso to the outward tax liability under Table 3. Table 4 deals with ITC and specifically provides for details of 'ITC Reversed' at Row 4(B) including other reversals. Therefore, the incongruity persisted between the statutory provision and the procedural functionality.

The proposed amendment seeks to bring the provision in line with Form GSTR-3B return functionality, which provides for reversal of credit, and not addition to the output tax liability.

Section 50 is the sole provision governing interest liability for all aspects under the CGST Act. The amendment seeks to bring uniformity by linking the interest liability under the second proviso to Section 16(2) to Section 50. Consequently, interest liability on ITC reversal will take effect only if two conditions are cumulatively satisfied:

- (i) The ITC is utilised; and
- (ii) Expiry of 180 days from the date of invoice requiring reversal of ITC.

Both the above-mentioned conditions need to be cumulatively satisfied for applicability of interest. This is in line with the objective of interest as delineated in the Apex Court judgment in the case of ***Pratibha Processors v. UoI, 1996 (88) ELT 12 (SC)***.

Further, the interest liability will be computed from date on which last event occurs. For example, where the taxpayer has sufficient ITC balance, no interest liability will arise even upon expiry of 180 days. Only when the taxpayer has utilised the ITC, liability to pay interest will arise from 181st day, i.e. upon expiry of 180 days from date of invoice when requirement to reverse the ITC arises.

ANANTHAM LEGAL

O: 213, Block-H, Sector-63, Noida, Uttar Pradesh-201 301

W: www.anantham.legal; E: contact@ananthamlegal.com; M: +91-9621252608

Reversal of ITC in case of in-bond sales [*Explanation to Section 17(3) of CGST Act*]

The Finance Bill proposes to amend the Explanation to Section 17(3) of the CGST Act which deals with the value of exempt supply. The proposed amendment provides for inclusion of value of in-bond sales in the value of exempt supply for computation of input tax credit reversals.

Our Comments

Paragraph 7, Paragraph 8(a) and Paragraph 8(b) were inserted simultaneously in Schedule III of CGST Act *vide* Central Goods and Services Tax (Amendment) Act, 2018 brought into force with effect from February 1, 2019. The three entries pertain with third country sales, in-bond sales and high sea sales. The proposed amendment singles out only in-bond sales for reversal of input tax credit. The objective behind proposed amendment seems perplexing and seems to be devoid of proper reasoning.

One possible rationale is disallow input tax credit to duty free shops. In the case of ***Cial Duty Free and Retails Services Limited v. Uol, 2020 (42) GSTL 481 (Ker.)***, the High Court held that sale of goods by a duty free shop to an outbound passenger will qualify as exports. There will be no requirement to reverse the ITC since entries in Schedule III of CGST Act do not form part of value of exempt supply. Similar observations were made in respect of outbound as well as inbound passenger in the case of ***Sandeep Patil v. Uol, 2019 (31) GSTL 398 (Bom.)***. In this process however the proposed amendment disallows credit to cases other duty free shops.

Restricting credit of input tax paid on expenditure towards corporate social responsibility [*Section 17(5) of CGST Act*]

The Finance Bill proposes to insert Clause (fa) in Section 17(5) of the CGST Act to disallow ITC on expenditure incurred towards corporate social responsibility ('CSR') obligations under Section 135 of the Companies Act, 2013 ('Companies Act').

Our Comments

This amendment is extremely undesirable as it serves a double whammy to taxpayers. The taxpayers are being deprived of ITC benefit arising out of a statutorily mandated obligation. This treatment of

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CSR activities is also in stark contrast to Section 17(5)(b) which specifically allows ITC on goods or services being provided by taxpayer pursuant to a legal obligation.

The Authority for Advance Rulings ('AARs') have adopted opposing views on the question of ITC on CSR activities. Some AARs [*In re: Polycab Wires, 2019 (24) GSTL 103 (AAR-GST)* and *In re: Adama India, 2021 (9) TMI 1061 –AAR GUJ*] have treated the goods provided under CSR activities as gifts separately covered under the category of blocked credits. These AARs also noted that Section 2(d) of the Companies (Corporate Social Responsibility Policy) Rules, 2019 defines CSR Policy to exclude activities undertaken in pursuance of normal course of business. Therefore, such activities do not qualify the rigours of nexus with business under Section 16(1) of the CGST Act.

Alternatively, some AARs [*In re: Bambino Pasta, 2022 (11) TMI 482-AAR TELANGANA* and *In re: Dwarikesh Sugar Industries, 2021 (53) GSTL 482 – AAR UP*] held that legally mandated CSR obligations were not undertaken voluntarily, and thus do not form gifts. Further, owing to the legal mandate, CSR activities are related to the business of the taxpayer, who are thus entitled to avail ITC thereon.

It is important to note that deduction of CSR expenditure was disallowed through insertion of an Explanation under Section 37 of the Income-tax Act, 1961 ('Income-tax Act') *vide* Finance Act, 2014. The Delhi High Court in the case of *CIT v. PEC Limited, ITA 268/2022, ITA 269/2022 and ITA 270/2022 (MANU/DE/5132/2022)* held that the explanation to Section 37 is prospective in nature.

The proposed amendment seeks to align the position under CGST Act with that prevailing under Income-tax Act. Since the instant amendment is introduced in the main provision of Section 17(5) of CGST Act, this restriction will be applicable prospectively. However, such disentitlement is indeed a retrograde step worthy of condemnation.

Retrospective effect to certain entries in Schedule III of CGST Act

The Finance Bill proposes to insert Paragraph 7 and 8 of Schedule III of CGST Act covering third country sales, in-bond sales and high sea sales with effect from July 1, 2017.

Our Comments

The transaction of third country sales, high sea sales and in-bond sales invited scrutiny regarding the applicability of goods and services tax ('GST'). The Central Goods and Services Tax (Amendment) Act, 2018 inserted Paragraphs 7 and 8 in Schedule III with effect from February 1,

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2019. Pursuant to the amendment, these activities qualified neither as supply of goods nor as supply of services, and thus were outside the scope of GST. The revenue however continued to issue notices for the period of July 2017 to January 2019. The proposed amendment gives retrospective effect to the entries, and thus will nip the issue in bud. However, the proposed amendment restricts refund in case the taxpayer has accepted the liability and paid the applicable tax.

Exemption from registration under GST [Section 23 of CGST Act]

The Finance Bill proposes to make Section 23 of CGST Act providing the exemption from obtaining registration to certain taxpayers a *non obstante* clause. The provision will override Section 24 providing for compulsory registration in certain cases. The proposed amendment will be given retrospective effect.

Our Comments

The proposed amendment has been made to resolve the conflict arising in respect of Section 23 conferring exemption from registration and Section 24 providing for compulsory registration. For e.g., a taxpayer engaged in making supplies of goods covered under reverse charge mechanism making an inter-state supply. The retrospective amendment will nip the issue in bud.

Scope of online information and database access or retrieval services [Section 2(17) of IGST Act]

The Finance Bill proposes to amend the definition of 'online information and database access or retrieval services' under Section 2(17) of Integrated Goods and Services Tax Act, 2017 ('IGST Act'). The proposed amendment excludes the requirement of activities essentially automated and requiring minimal human intervention for it to qualify under online information and database access of retrieval ('OIDAR') services.

Our Comments

There are several disputes arising in respect of scope of OIDAR services. Essentially, any activity involving access to information or database through information technology, where the supply involves automation of such access and requires minimal human intervention qualifies as OIDAR. This is distinct from creation of content at the behest of service recipient, and thus not covered within the scope of OIDAR services. The proposed amendment seeks to exclude the requirement of

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automation and minimal human intervention as a pre-requisite to qualify as OIDAR service. The resultant expansion of the scope of OIDAR services is unnatural, and will thus only lead to further disputes regarding the scope of OIDAR services.

Place of supply in case of supply of transportation services in case of export [Proviso to Section 12(8) of IGST Act]

The Finance Bill proposes to omit the proviso appended to Section 12(8) of IGST Act laying down the mechanism for determination of place of supply in case of transportation services rendered by an Indian transporter to Indian exporter.

Our Comments

Section 12(8) of IGST Act lays down the mechanism for determination of place of supply for transportation services where transporter as well as recipient are located in India. In terms thereof, the place of supply shall be the place where goods are handed over to the transporter. The proviso appended thereto covers cases where transportation involves export, wherein place of supply shall be the destination. Thus, supply of transportation services by Indian transporter to Indian exporter qualified as inter-state supply.

Entry 20A and 20B of **Notification No. 9/2017-Integrated Tax** dated June 28, 2017 conferred exemption on transportation of goods by aircraft or vessel for export. The exemption was however eligible only till September 30, 2022. Thus, the activity of transportation of goods by Indian transporter for Indian exporter came under tax net only with effect from October 1, 2022.

Issue arose regarding admissibility of credit even as integrated tax was being levied because place of supply was outside India and recipient was situated in India. The revenue sought to disallow the credit to Indian exporter being recipient of transportation services.

The proposed amendment seeks to omit the proviso. As a corollary, the place of supply for transportation services shall be as per the place at which goods are handed over to transporter. This would allow free flow of credit in most situations. However, where an Indian exporter engages two transporters, one for inter-state transportation from its premises to transporter engaged in providing transportation for export and another for providing the service of transportation of goods for export, the issue may still persist.

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Timelines for undertaking certain compliances [*Sections 37, 39, 44 and 52 of CGST Act*]

Limitation period of 3 years has been introduced in respect of the undertaking the following compliances:

- Furnishing details of outward supplies in Form GSTR-1;
- Furnishing Form GSTR-3B return;
- Furnishing annual return in Form GSTR-9; and
- E-commerce operator furnishing statement in Form GSTR-8

Our Comments

The proposed amendment will practically only be applicable for taxpayers not having filed their annual return. In case of non-filing of Form GSTR-1 statement and Form GSTR-3B return for even some months, the tax department is vigilant enough to initiate proceedings for cancellation of registration. Since filing of returns is a procedural aspect of tax law, the proposed amendment will be applicable on all compliances for previous years as well.

Relief to composition taxpayers supplying goods through electronic commerce operators [*Section 10 of CGST Act*]

The Finance Bill proposes to allow a person engaged in making supply of goods through an e-commerce operator collecting tax at source to avail the benefit of composition scheme. The proposed amendment should enable the potential of small retailers.

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THANK YOU!



ANANTHAM LEGAL

O: 213, Block-H, Sector-63, Noida, Uttar Pradesh-201301

E: contact@ananthamlegal.com

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