

INPUT TAX

CREDIT

AN OVERVIEW OF CURRENT ISSUES

SECTION 16(2)(c)

Actual payment of tax to the Government by
the Supplier

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,—

subject to the provisions of Section 41, 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

OBJECT

- Curb improper avilment of ITC without actual deposit of tax with the Government.
- If the tax is not deposited and avilment of ITC is also allowed, it may result in *double loss* to the exchequer, once as tax and another when such credit is set off against the outward tax liability

ISSUES & QUESTIONS

- Capacity of the supplier - on collection of tax, does the supplier assume the character of agent or holds the tax amount in constructive trust?
- Under GST, the tax amount is always explicitly earmarked in the invoices and all documents - the recipient pays such amount as tax and it is understood by the parties that it is of the Government once invoice indicates it as tax.
- *Joshi's case* under the erstwhile law.

CONSTITUTIONALITY CHALLENGE

Possible grounds and perspectives

From the Assessee

- Discrimination – (i) Same supplier (ii) Different supplier but same receipient; (iii) Bona fide errors of supplier.
- Arbitrary – Even a plenary legislation can be challenged on the ground of manifest arbitrariness (Shayara Bano);
- Where infraction committed by an independent third party, is there any jurisprudential basis to visit consequences on the assessee

- *Lex non cogit ad impossibilia* – It is for the state to enforce.
- Delayed enforcement and recovery against the supplier by the State which results in collection of such tax by the exchequer eventually - loss of ITC even then.

From the Department

- **Presumption of constitutionality – not easily dislodged in a fiscal legislation.**
- **Courts must exhaust every conceivable reason to sustain the provision – burden on the person attacking the legislative arrangement to negate every conceivable ground which might support it.**
- **Aberrations – validity cannot be impugned on the basis of stray cases but on the basis of the generality of the operation of the law.**

- **Hardship not a ground to hold the provision constitutionally invalid.**
- **The nature of ITC - concession / not an inherent right / contingent right – failure to fulfill the preconditions results in not vesting of the credit.**
- **No question of reading down the provision.**



MANUFACTURING LOSS

SECTION 17(5)(h)

Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples

ISSUES & QUESTIONS

- **Manufacturing loss - would it constitute loss/destroyed in the context of Section 17(5)(h).**
- **Input – used or intended to be used in the course or furtherance of business – manufacture is business.**
- **If inputs/consumables undergo evaporation or vapourization or consumed in the process of manufacture, does it amount to loss or destruction – difference between use and loss/destruction. Once it is used in the course of manufacture, it cannot be stated as lost or destroyed.**

- **Manufacturing loss forms part of raw material - Multimetals case**
- **Weight of raw material used in the manufacture of pipes and tubes limited to the corresponding weight of the end product – reversed by the Supreme Court.**
- **Quantitative requirement - Swadeshi Polytex, Indian Aluminium & Ruta**
- **Test of indispensability - Ballarpur**
- **Test of commercial/practical expediency - JK Cotton**

SECTION 16(4)

Time limit to take credit

SECTION 16(4)

A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the thirtieth day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Decisions of the Patna & Andhra Pradesh High Courts

Arguments advanced by the assessee

- ITC is a vested right.
- 16(4) is merely procedural in nature and cannot override the substantive right under Section 16(1).
- Fixation of cut off date has no rationale.

Arguments of the department

- **ITC is a concession**
- **Any date would have an element of arbitrariness**
- **Covered by Jayam & ALD where similar timelines were upheld.**

Similar challenges pending before many High Courts including the Madras High Court

ELECTRONIC CASH LEDGER

**Mere deposit or amounts to payment of
taxes**

- **Excess amount available in electronic cash ledger – non-payment of tax – permissibility of levy of interest.**
- **Mere availability of the sufficient amounts in the cash ledger does not mean that the Gov can use it.**
- **Inapplicability of doctrine unjust enrichment – validation that the amounts available in Electronic Cash Ledger is not taxes.**

THANK YOU

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JUDGE, MADRAS HIGH COURT