



SHATTERED DREAM OF SEAMLESS FLOW OF CREDIT WITH UN-MATCHED INVOICES IN GST REGIME

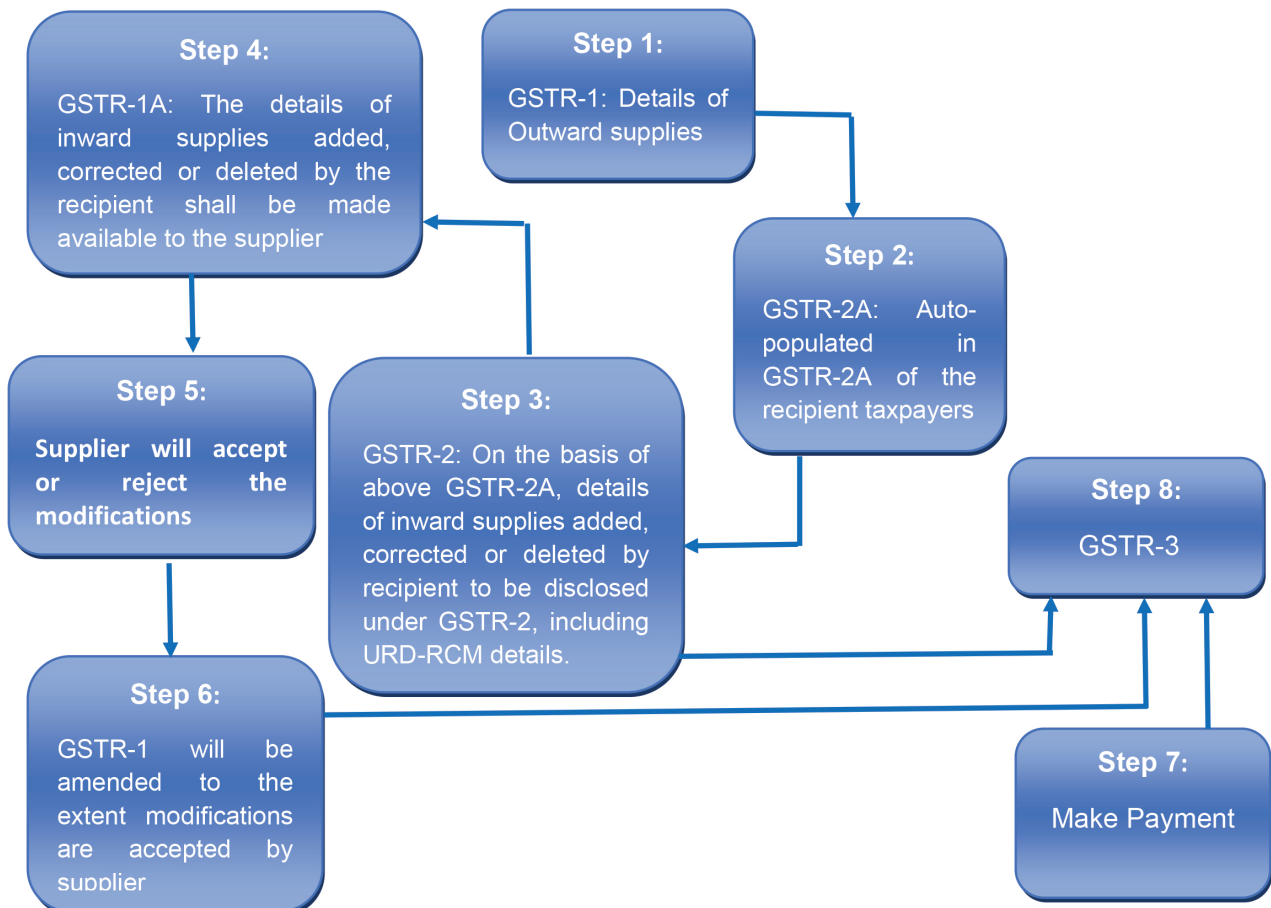


CMA. Susanta Kumar Saha
Tax and Management Consultant

Promulgation of GST law has been the biggest reform in indirect taxation in India which mandated integration entire nation's diverse majority tax portfolio into a single taxation system. One of the major objectives was to remove cascading effect that was

prevailing in the erstwhile regime, with uninterrupted and seamless flow of credit to the taxpayers. Denial of benefit of input tax credit to a taxpayer only adds cost to the goods or services. And accordingly the GST law was originally formulated and designed.

A. Scheme originally envisaged in GST Law:





Section 37 of the CGST Act, 2017 stipulates, every registered person, other than those specified in the Act, shall furnish, electronically details of outward supplies.

Section 38(1) of the CGST Act, 2017 stipulates, every registered person, other than those specified in the Act, shall verify, validate, modify or delete, if required, the details relating to outward supplies and credit or debit notes communicated under sub-section (1) of section 37 to prepare the details of his inward supplies and credit or debit notes. Recipient registered taxpayer shall not only verify, validate, modify or delete auto-populated inward invoices but shall also include/add details of inward invoices, debit notes or credit notes that were not declared by the supplier. Thus, the purchase register of a registered taxpayer was proposed to have been built on matching invoice/Debit notes/Credit notes when such inward supply of goods or services were supplier by another registered taxpayer.

Section 39(1) of the CGST Act, 2017 stipulates that every registered person, other than those specified therein shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed.

Section 42 of the CGST Act, 2017 stipulates mechanism of matching, reversal and reclaim of input tax credit wherein it is categorically stated that 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. accordingly,

Rule 69 of the CGST Rules, 2017 stipulates matching of claim of input tax credit which inter-alia includes input tax credit on inward supplies including imports, provisionally allowed under section 41 of the CGST Act, 2021, shall be matched under section 42 after the due date for furnishing the return in FORM GSTR-3. First proviso to Rule 69 states that where the time limit for furnishing FORM GSTR-1 specified under section 37 and FORM GSTR-2 specified under section 38 has been extended, the date of matching relating to claim of input tax credit shall also be extended accordingly. It was further explained that the claim of input tax credit in respect of invoices and debit notes in FORM GSTR-2 that were accepted by the recipient on the basis of FORM GSTR-2A without amendment shall be treated as matched if the corresponding supplier has furnished a valid return. **Thus, the emphasis was given to matching of outward invoices and debit notes raised by the**

supplier with inward supply of invoices and debit notes of the recipient for the purpose of claiming the benefit of input tax credit.

However, Form GSTR-2 and Form GSTR-3 couldn't be made operational due different operational issues. This had resulted extension of time limits for filing Form GSTR-2 and Form GSTR-3 from time to time in the initial period through different notifications, and subsequently for an indefinite period.

Thus, for the purpose of claiming the benefit of input tax credit, system (portal) based procedure of matching outward and inward invoices/debit notes/credit notes by and between the supplier and the recipient, both, as were originally envisaged, couldn't even start. In the event of inoperative Form GSTR-2 and Form GSTR-3 in the online platform, section 42 of the CGST Act, 2017 read with Rule 69 of the CGST Rules, 2017 become non-operational since promulgation of the law itself.

B. Alternative Scheme brought:

It appears, acknowledging the difficulty to make Form GSTR-2 and Form GSTR-3 operational, government proposed an alternative procedure through section 43A of the CGST Act, 2017 for the purpose of laying down the procedure for furnishing return and availing input tax credit. Few salient points of this section are as under: -

- Sub-section (1): notwithstanding section 16(2), section 37 or section 38, every registered person shall furnish return under section 39(1), verify, modify or delete the details of supplies furnished by the suppliers.
- Sub-section (2): for availing of the benefit of the input tax credit, the procedure to be followed as may be prescribed notwithstanding anything contained in section 41, section 42 or section 43. This proposes to give an overriding effect on section 42, *ibid*.
- Sub-section (3): the procedure for furnishing the details of outward supplies by the suppliers, for claiming the benefit of input tax credit by the recipients, as may be specified.
- Sub-section (4): the procedure for claiming the benefit of input tax credit for outward invoices **not furnished** by the suppliers shall be as may be specified including the maximum amount of input tax credit which can be so claimed, **not exceeding maximum twenty per cent** of the available input tax credit based on the details furnished by the suppliers.
- Sub-section (6): the **supplier** and the **recipient** of a



supply shall be jointly and severally liable to pay tax or to pay the input tax credit availed, as the case may be in case of contravention as stipulated under sub-section (3) or sub-section (4), stated above.

Section 43(A) of the CGST Act, 2017 was brought through the CGST (Amendment) Act, 2018 which, incidentally has not yet been enforced gives an occasion to sense that the government has scrapped the idea of new returns too.

In short, the recipient of goods or services or both, has been liable to pay tax on the input tax credit claimed if tax on such supply (outward) has not been paid by the supplier to the Government Exchequer. Whereas the recipient has not been provided any mechanism to ascertain whether the tax on an outward supply has been paid by the supplier to the government exchequer. The legal maxim '**Lex Non Cogit ad Impossibilia**' means that law does not compel a man to do that which cannot be possibly be performed. Lot of case laws may be relied upon in this regard.

C. Twist in the tale:

Although the section 43A has not been notified, *ibid*, but sub-section (4) of section 43A, was introduced through introduction of rule 36(4) of the CGST Rules, 2017 w.e.f 09.10.2019, vide Notification No. 49/2019 – Central Tax dated 9th October, 2019 which inter-alia states that "**Input tax credit to be availed by a registered person** in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37." Rule 36(4) has re-opened the chapter of invoice matching for the purpose of claiming the benefit of input tax credit based on the details of outward invoices/debit notes (DN)/credit notes (CN) furnished by the supplier.

Assuming but not admitting, the application of matching of invoices/DN/CN on the strength of rule 36(4) is binding on the taxpayer with effect from 09.10.2019, itself, signifies that such matching of invoices, restriction of input tax credit to 120% of the matched invoices/DN/CN, was not applicable till 08.10.2019 in the absence of machinery provision. Thus, the claim to deny the benefit of input tax credit on the pre-text of not auto-populated in Form GSTR-2A/Form GSTR-2B by the revenue department till 08.10.2019 may be argued along with other relevant points.

Rule 36(4) of the CGST Rules, 2017 has been introduced

without any support from the corresponding Act, more particularly in the light of inoperative sections, viz, section 42, section 43 and section 43A and non-operation Form GSTR-2 and Form GSTR-3. This give rise to the question as to whether rule can override act which is likely to be determined in the court of law. In this regard, reliance may be placed on **UNION OF INDIA VERSUS S. SRINIVASAN [2012 (7) TMI 710 - SUPREME COURT]** wherein the Hon'ble judges held in affirmative when said bench examined whether the Rule which has travelled beyond the scope and ambit of the Act, and, in fact, directly runs counter to the provisions in the Act and, therefore, deserves to be declared ultra-virus. Similar view was upheld in the case of **UNION OF INDIA AND ANR. VERSUS M/S. INTERCONTINENTAL CONSULTANTS AND TECHNOCRATS PVT. LTD. [2018 (3) TMI 357 - SUPREME COURT]** when the Hon'ble judges examined whether Section 67 of the Act permits the subordinate legislation to be enacted in the said manner, as has been done for the purpose of includibility (valuation) of Rule 5 of the Service Tax (Determination of Values) Rules, 2006. There are many such cases which can be relied upon. **Thus, it can be argued that Rule 36(4) suffers from various legal infirmities.**

D. Conditions for claiming the benefit of input tax credit:

Section 16 stipulates the eligibility and the conditions for taking input tax credit, *inter alia* includes:

Sub-section (2) stipulates that 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) the taxpayer is in possession of a tax invoice or debit note issued by a supplier, registered under the act;
 - aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;
- b) the taxpayer has received the goods or services or both;
- c) 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 utilisation of input tax credit admissible in respect of the said supply; and
- d) he has furnished the return under section 39.



In the absence of an appropriate mechanism to ascertain as to:

- i) whether tax under an invoice/DN has been paid to the government exchequer is an impossible task to perform by the recipient of supply, and
- ii) denial of input tax credit of the recipient due to un-matched invoices/DNs who has otherwise fulfilled all other three conditions seems to be very harsh and are questionable.

A few case laws may be relied upon by a recipient taxpayer which are discussed below:

1. UNION OF INDIA VERSUS BHARTI AIRTEL LTD. & ORS. [2021 (11) TMI 109 – SUPREME COURT] dated 28.10.2021

The Hon'ble Court has observed that **Form GSTR-2A is merely a facilitation to the recipient** to know that their supplier has uploaded their outward tax invoices/DN/CN in the common portal. Instead of relying on Form GSTR-2A, the recipient should rely on his books of accounts to claim the benefit of input tax credit. Thus, on the strength of the said ruling, it can be argued that Form GSTR-2A need not to be considered for the purpose of claiming the benefits of input tax credit.

2. M/S. D.Y. BEATHEL ENTERPRISES VERSUS THE STATE TAX OFFICER (DATA CELL), (INVESTIGATION WING) COMMERCIAL TAX BUILDINGS, TIRUNELVELI. [2021 (3) TMI 1020 – MARDAS HIGH COURT]

The petitioner (M/s. D. Y. Beathel Enterprises) had purchased goods from one Charles and his wife Shanthi (hereinafter stated as supplier, in short) who is also a registered tax payer under the GST law, paid significant amount through banking channel including the tax amount to the supplier, which on scrutiny was found to have been not paid to the government exchequer by the supplier. The STO initiated action against the petitioner straight way who was alleged to have failed to furnish any proof of payment of tax on which the Hon'ble Court observed that the respondent (STO) will initiate enquiry afresh against the supplier, and parallelly will initiate recovery action against the supplier.

Thus, action against the recipient on the ground of not payment of tax by the supplier on the strength of section 16(2)(c) was not encouraged.

3) ON QUEST MERCHANDISING INDIA PVT. LTD., SUVASINI CHARITABLE TRUST, ARISE INDIA LIMITED, VINAYAK TREXIM, K.R. ANAND, APARICI CERAMICA,

ARUN JAIN (HUF) , DAMSON TECHNOLOGIES PVT. LTD., SOLVOCHEM, M/S. MEENU TRADING CO., & MAHAN POLYMERS VERSUS GOVERNMENT OF NCT OF DELHI & ORS. & COMMISSIONER OF TRADE & TAXES, DELHI AND ORS. [2017 (10) TMI 1020 - DELHI HIGH COURT]

The hon'ble Court, in the above referred matters, opined that the legislature to make a distinction between purchasing dealers who have bona fide transacted with the selling dealer by taking all precautions as required by the Act and those that have not.

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 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.

4) M/S. BHARAT ALUMINIUM COMPANY LIMITED VERSES UNION OF INDIA AND OTHERS [2021 (6) TMI 1052 - CHHATTISGARH HIGH COURT]

Judgement passed by the Hon'ble Madras High Court was followed in this case. It was opined that if the default is made by non-payment of tax by the seller, the recovery shall be made from the seller and only in exceptional circumstances, it can be recovered from the recipient. Therefore, the input tax credit which was claimed by the petitioner cannot be denied for the reason that the seller has not uploaded their invoices on time.

It was directed that on petitioner's depositing 5% amount of 14,93,79,211/- demanded vide order dated 22.01.2021, issued by the respondent, within a period of 15 days, no coercive steps shall be taken pursuant to the said order. And the respondent was given four weeks time to submit their reply.

In short, ITC cannot be denied merely on the ground that the invoices are not reflected in Form GSTR-2A.

5) LGW Industries Limited & Ors. Vs Union of India & Ors. (Calcutta High Court) [WPA No. 23512 of 2019] Date of Judgement/Order: 13/12/2021

Hon'ble Calcutta Court, in this case, directed the respondent (GST Authorities) to consider the cases afresh, the case of the petitioner on the issue of their entitlement of benefit of input tax credit in question by considering



the documents which the petitioner wants to rely upon in support of their claim of **genuineness of the transactions** in question and shall also consider as to whether payments on purchases in question along with GST were actually paid or not to the suppliers (RTP) and also to consider as to whether the transactions and purchases were made before or after the cancellation of registration of the suppliers and also consider as to compliance of statutory obligation by the petitioners in verification of identity of the suppliers (RTP).

If it is found upon considering the relevant documents that all the **purchases and transactions** in question **are genuine** and **supported by valid documents** and **transactions** in question **were made before the cancellation of registration** of those suppliers and after taking into consideration the judgments of the Supreme Court and various High Courts which have been referred in this order and in that event **the petitioners shall be given the benefit of input tax credit in question.**

Thus, a transaction cannot be said to be fake in the event of cancellation of registration of a taxpayer at a later date with retrospective effect. And in the event, the transactions are verified to be genuine, duly supported by the documents and records of the recipient, i.e, other conditions of section 16(2) of the GST law are fulfilled, the supplier was a registered taxpayer at the time of transactions entered into, benefit of ITC cannot be denied.

E. Recent Notification:

Section 16(2)(aa) was inserted into CGST Act, 2017 by section 109 of The Finance Act, 2021 (13 of 2021), shall come into force with effect from 1st day of January, 2022 as has been notified vide Notification No. 39/2021 – Central Tax dated 21.12.2021.

Now, revenue may argue that claiming the benefit

of input tax credit based on the auto-populated inward invoices/DN/CN in Form GSTR-2A/Form GSTR-2B of the recipient taxpayer, is backed by an applicable provision of the Act. Although, the issue of denial of input tax credit on un-matched invoices/DN/CN which are duly recorded in books of accounts and, otherwise satisfy the remaining conditions of section 16(2), may continue to remain a disputed matter.

F. End Note:

Hon'ble Calcutta High Court has very rightly put an emphasis on to identify the bonafide and non-bonafide taxpayers. Issues discussed above only cause hardship to the honest taxpayers. Admittedly there have been plenty of cases unearthed by the revenue where recipients have claimed input tax credit based on fake invoices, i.e, where goods or services or both, have not been supplied by the suppliers which is violative of section 16(2)(b) of the Act. And such cases no doubt cause a great loss to the government exchequer. All the recovery mechanism be initiated from the non-bonafide taxpayers to protect the loss of revenue. But sparing the honest taxpayers from denial of input tax credit due to unmatched invoices/DNs will not only uphold the spirit of law, reduce litigation but also promote the 'ease of doing business' campaign of the government for which law and technology, both, need to play appropriate role. And revenue department needs to strike a proper balance in this regard.

Disclaimer:

The publications contain information solely for informational purpose. It is not a guidance note and does not constitute any professional advice at all. The author does not accept any responsibility for any loss or damage of any kind arising out of any information in this article or for any actions taken in reliance thereon.

