

# DECODING PROPOSED SEC 38 OF CGST ACT



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**T**he rationale behind the implementation of GST is to bring more transparency to the system and to avoid cascading effect of taxes. Input Tax Credit is the soul of the GST Law. Ever since the enactment of the Goods and Services Tax Act, 2017 conditions for availment of input tax credit has been the subject matter of debate. Seamless flow of input tax credit is the essence of the GST Law and the point where it breaks, it goes against this very principle. On one side, the Act promotes seamless flow of ITC and on the other side the amendments attempts to break this chain.

It is a well settled law that Input Tax Credit is in the nature of a benefit or concession which is offered by the statute and is contingent upon satisfaction of specified conditions. ITC under the GST Law cannot be said to be a vested right at the time of procurement of inputs. However, it becomes a vested right only after complying with all the conditions attached to it. Thus, a complete knowledge of all the mandatory conditions is necessary to declare it a vested right. However, even though it is concluded that ITC is not a vested right, it needs to be examined as to whether unnecessary, impossible and draconian conditions can be imposed on the honest taxpayers in the masquerade of curbing tax evasion.

Presently for availing ITC, conditions u/s 16 of CGST Act have to be complied and the most debatable issue is with regarding to 16(2)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 also regarding sec.16(4) time limit for availing credit.

Whereas a new condition to avail eligible credit via 16 (2) (aa) implemented recently and proposed 16 (2) (ba) in finance bill 2022 prescribes extra condition 'non-denial of credit via proposed Sec. 38'. Moreover it is proposed to make return submission procedure to be a single way instead of two way communication as intended at the time of implementation of GST by omitting Sec. 42, 43 and 43A. These amendments literally exasperate the emotions of genuine taxpayers.

The proposal provides that input tax credit with respect to a supply can be availed only if such credit has not been restricted in the details communicated to the taxpayer under section 38. As a result ITC in form GSTR 2B would have two baskets, one with eligible credit and another with ineligible credit via conditions mentioned in proposed sec.38.

## NEW CONDITIONS U/s 38

From the Buyer's perspective, if their respective supplier falls under any of below mentioned category then the ITC from the respective supplier, though the same reflects in GSTR 2A/2B, shall be counted as ineligible credit. The supply:

- (i) by any registered person within such period of taking registration as may be prescribed; (NEW REGISTRANTS)
- (ii) by any registered person, who has defaulted in payment of tax and where such default has continued for such period as may be prescribed (DEFAULTER IN PAYMENT OF TAX).
- (iii) by any registered person, the output tax payable by whom in accordance with the statement of outward



supplies furnished by him under the said subsection during such period, as may be prescribed, exceeds the output tax paid by him during the said period by such limit as may be prescribed (VALUE DECLARED IN GSTR 3B < GSTR 1)

(iv) by any registered person who, during such period as may be prescribed, has availed credit of input tax of an amount that exceeds the credit that can be availed by him in accordance with clause (a), by such limit as may be prescribed. (TOOK ITC EXCESS IN 3B ABOVE FROM 2B).

(v) by any registered person, who has defaulted in discharging his tax liability in accordance with the provisions of sub-section (12) of section 49 subject to such conditions and restrictions as may be prescribed;(VIOLATED 99% ITC AND 1% CASH - CONDITION)

(vi) by such other class of persons as may be prescribed.

This can be best understood with an illustration which is explained below: -

### BEFORE PROPOSED AMENDMENT IN SECTION 38

PARTICULARS	AMOUNT
Total ITC As Per Books	12,00,000.00
ITC Reflected In The GSTR 2B	10,00,000.00
Eligible ITC As Per GSTR 2B	8,00,000.00
ITC That Can Be Availed	8,00,000.00

### AFTER PROPOSED AMENDMENT IN SECTION 38

PARTICULARS	AMOUNT
Total ITC As Per Books	12,00,000.00
ITC reflected in the GSTR 2B	10,00,000.00
Eligible ITC as per GSTR 2B	8,00,000.00
ITC that can be availed before Sec.38 Conditions	8,00,000.00

### NEW CLAUSES IN SECTION 38

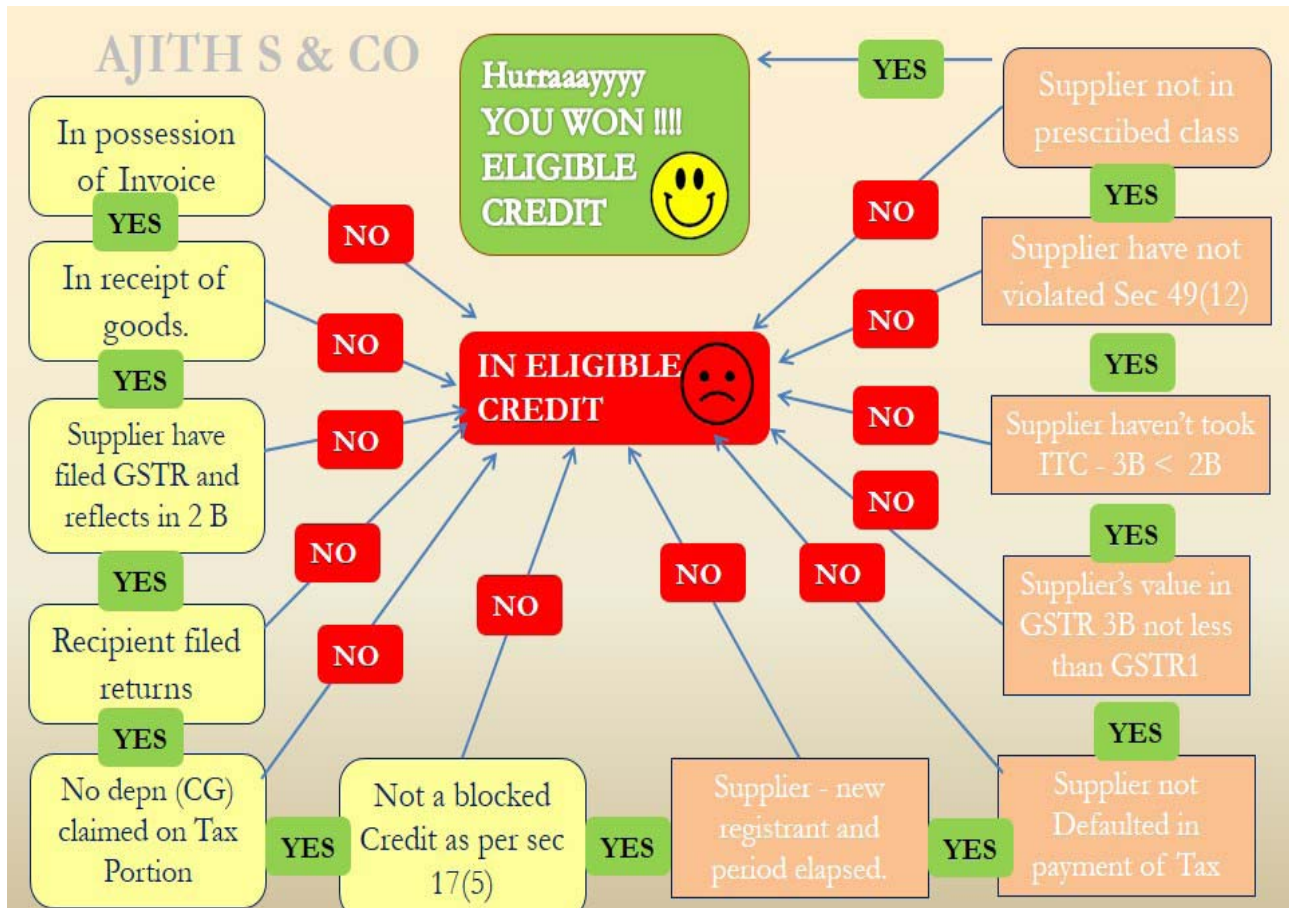
PARTICULARS	ITC Disallowed (Amount Assumed)	Remaining ITC that can be availed
Supplier is newly registered business under GST ( Condition (i) Clause (b) of Subsection (2) )	20,000.00	7,80,000.00
Supplier has filed GSTR - 1 but not filed GSTR - 3B ( Condition (ii) Clause (b) of Subsection (2) )	40,000.00	7,40,000.00
Supplier's liability in GSTR - 1 is greater than that of GSTR - 3B ( Condition (iii) Clause (b) of Subsection (2) )	50,000.00	6,90,000.00
Supplier's ITC in GSTR - 3B is greater than in GSTR - 2B ( Condition (iv) Clause (b) of Subsection (2) )	80,000.00	6,10,000.00
Supplier has received demand notices and defaulted in the payment of taxes ( and the default continues ) ( Condition (v) Clause (b) of Subsection (2) )	50,000.00	5,60,000.00
Supplier has not fulfilled the conditions of Rule 86B ( i.e. paid their entire liability in ITC instead of partly in cash as prescribed ) ( Condition (vi) Clause (b) of Subsection (2) )	60,000.00	5,00,000.00

Hence, out of 8,00,000 ITC that could be availed as per the existing law, the eligible ITC has been reduced to Rs.5,00,000.00 as per the revised provisions of Section 38.

In short the default on the part of the supplier keeping in mind the above mentioned conditions forces the recipient to loose the opportunity to avail ITC and in turn pay more taxes which tones with "You must pay taxes. But there's no law that says you got to leave a tip."—Morgan Stanley advertisement.

### ROLE OF JUDICIARY

The Honourable judicial system is providing aid to these genuine hardships faced by the assesseees and passing



orders in favour of assesseees. However, in case any sort of nexus is established between the buyer and the seller and it is proved that the transaction was made with an intent to evade taxes, the taxpayers shall have to face the wrath of law. Undoubtedly, strict actions have to be initiated in cases where fraudulent availment of ITC or evasion of tax is being found. A system must be designed to penalise the guilty thereby protecting the interest of honest tax payers.

Various decisions have held that ITC should not be denied to the bona fide purchasing dealers merely on fault of the selling dealers. It should not be made the responsibility of the purchasing dealer to ensure that the tax is deposited by the selling dealer to the extent the transaction is bona fide. Liability shouldn't be inflicted on the purchasing dealer unless a wilful or a fraudulent act on the part of the registered seller or his predecessors is established. As long as the vendor is found to be a registered dealer on the files of the Revenue, the claim of the assessee for ITC could not be rejected. The Revenue also does not deny that the assessee's vendors are all registered appellants on the files of the Revenue. Assigning the department's responsibility of tax payment by the selling dealer shouldn't be placed on the purchasing dealer. Collecting more taxes

than is absolutely necessary is legalized robbery and due to this sole reason reliance is placed on the judicial system in our country. Following verdicts by the honourable courts have proved to be favourable to the assesseees:-

### Mismatches in GSTR 1 & GSTR 3B

- **M/S Deepak Print v. Union of India - Hon'ble Gujarat High Court** directed the revenue department to allow the rectification of entries in the Form GSTR-3B return for the Month of May, 2019, on account of genuine bonafide human error.
- **Pentacle Plant Machinerics Pvt. Ltd. v. Office of the GST Council and ors.** - The **Hon'ble Madras High Court** has allowed the assessee to correct a "human error" while filing Form GSTR-1 return.
- **Sun Dye Chem v. The Assistant Commissioner** - It was held that the assessee should not be mulcted with any liability on account of the bonafide, human error and must be permitted to correct the same.

- **Bharti Airtel Limited v. Union of India & Ors - Hon'ble Delhi High Court** held that the Petitioner should be permitted to rectify the Form GSTR-3B in respect of the relevant period.

### Mismatches in GSTR 2A and GSTR 3B/ Column 8A and 8B of GSTR 9

- **BHARTI TELEMEDIA LTD VS. UNION OF INDIA&ORS,** - Delhi High Court while issuing the notices to the centres ruled that the Input Tax Credit cannot be denied to the recipient for the default on the part of the Supplier.
- **LGW Industries Limited & Ors. Vs Union of India & Ors.** (Calcutta High Court) - ITC Cannot be disallowed, if the supplier not made the payment of tax, whereas buyer is bona fide.
- **D.Y. Bethal Enterprise v. The State Tax Officer (Data Cell) in W.P. (MD) No.2127 of 2021** - GST cannot be demanded from Buyer where Seller has not paid GST to Government.
- **Re: Sahil Enterprises v. Union of India WP(C) NO. 531 Of 2021** dated August 09, 2021 - Default on the part of the supplier for depositing tax to the government and denying credit of the bona fide purchasing dealer on the ground of default of the supplier requires consideration. (The Hon'ble High Court of Tripura)
- **Unifab Engineering Project Pvt. Ltd. and anr. Vs Deputy Commissioner CGST And CEX (Bombay High Court)** - Vires of Section 16(2) of CGST Act, 2017 challenged before HC.
- **"Union Of India Through Its ... vs Bharti Airtel Ltd."** on 28 October, 2021(SC)- The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment. The primary source is in the form of agreements, invoices/challans, receipts of the goods and services and books of accounts which are maintained by the assessee manually/electronically.
- **Surat Mercantile Association Vs Union of India (Gujarat High Court)** - Challenge to Section 16(2)(c) of CGST Act 2017- Notice issued by Gujarat HC.
- **Samay Alloys India (P.) Ltd. vs. State of Gujarat** - Blocking of ITC when credit not available in ledger is without jurisdiction and illegal: Gujarat HC.
- **Arise India Ltd. V. Commissioner of Trade and Taxes**

[TS-314-HC-2017(Del)-VAT - 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.

- **Infiniti Wholesale Limited Vs Assistant Commissioner (CT) (Madras High Court)** - TNVAT: No action against Buyer for Default of Seller.
- **Sri Vinayaga Agencies v. The Assistant Commissioner** - Madras High Court laid down that law could not empower tax authorities to reverse the ITC availed on a plea that the selling dealer has not deposited the tax.

### Refund of Wrongly paid tax(Paying CGST/SGST as IGST and Vice versa)-

- **SBI Cards & Payment Services Limited Vs Union of India (Punjab & Haryana High Court)** - HC directs department to refund GST paid under wrong head by petitioner.
- **Shree Nanak Ferro Alloys Pvt. Ltd. v. The Union of India (2020) 33 J.K.Jain's GST & VR 43 = 2020 (1) TMI 833 - JHARKHAND HIGH COURT** - The petitioner is entitled to the benefit of the provisions of S.77 (1), CGST Act, read with S.19 (2), IGST Act. The petitioner is directed to deposit the amount under correct head, which was paid under wrong head towards the liability of Sept., 2017, without any interest on the said amount.

### POSSIBLE SOLUTIONS

On the contrary to the above judgements favourable to the assessee there are decisions from the honourable courts against the recipients also, on the view that that we have to follow the law and we can't challenge the section provided in law (Hon. Madras High court). Keeping in view of these contraries it would be recommendable to amend the statute to protect the interests of genuine/honest tax payers, and also to keep track of bogus tax claimers. All these interferences may lead to turmoil in the entire tax paying system. The intended implementation of 'availment of provisional credit' if the credit doesn't appear in GSTR 2B or as in ineligible basket in new GSTR 2B may be re-implemented with applicable changes. Necessary involvements and actions are expected from the concerned authorities by the entire society to resolve the genuine concern.

The 'proper officer' has been empowered under GST law

to execute and administer compliance of various Sections and Rules under GST law to protect the Government revenue and facilitates to the taxpayers to carry out day-to-day statutory compliances to run their business. The words 'proper officer' used in various parts of the GST law scattered through different provisions therein needs specific assignment to be performed under different sections of the statute to serve respective purpose of the relevant sections and rules made thereunder. Keeping this view in mind, it would be fair to say that the Proper Officer should be given the responsibility of ensuring that each dealer within his/her rolls do not lose their respective ITC thereby freeing all the burden cast upon the recipient which in turn would enable the dealer to run his business smoothly and pay the required taxes to the public exchequer.

## RAY OF HOPE

In a recently issued internal circular no. 2A of 2022 dated 25.02.2022 by the the State of Maharashtra gives ray of hope for the genuine and Bonafide buyers giving various reliefs as mentioned:

Under inaccurate declarations in GSTR-1, there are two issues that the department has observed. Suppose a business has erroneously reported Business-to-Business (B2B) sales in Table 7 of GSTR-1 as a Business-to-Consumer (B2C) transaction, which is reported in a later period. However, the B2C sales entry is not reversed, leading to double reporting and excess tax payment. During the scrutiny, tax officials must reconcile the transaction-wise sales entries with the category totals. They should bifurcate B2B and B2C clearly, and check to identify such periods in which a B2C sale is denoted as a B2B sale.

On the other hand, a similar process is followed in case figures are erroneously or typographically overstated in GSTR-1 compared to the GSTR-3B. In addition to the above solution, the tax officials must also get an undertaking from the buyer in such sale

transactions that they have not availed any such excess ITC. For exports, they must check if export turnover is reflected in the refund computation.

Under the ITC claim cases, there are four issues that the department addressed. First, the list deals with any Input Tax Credit (ITC) differences between the GSTR-2A and GSTR-3B. Wherever the B2B transactions were reported as B2C in the supplier's GSTR-1, those would not appear in the relevant buyer's GSTR-2A. In

many cases, the buyer's GSTIN is wrongly entered in the GSTR-1. Further, the vendor had missed reporting B2B sales in GSTR-1 in many cases or under the wrong table, such as Table 4B instead of 4A.

The time limit to claim ITC has expired in all the above scenarios. The tax officer may categorise the transaction based on the ITC differences as more than Rs.2.5 lakh and less than or equal to Rs.2.5 lakh. The tax official may ask such a taxpayer to submit a Chartered Accountant (CA) certificate to confirm compliance and tax payment if it is the former. However, the claimant must obtain the ledger confirmation of the particular supplier and their certification in the latter case. The ITC claim difference shall be allowed after verifying one of the above submissions.

In another case, many recipients strictly interpreted the Removal of Difficulty order issued on 31st December 2018 for FY 2017-18 that had inserted a proviso to Section 16(4) of the CGST Act. They claim that the condition applies to recipients who have availed ITC for FY 2017-18 after September 2018 until March 2019. The department has clarified that only in cases where vendors have filed the GSTR-1 until March 2019 these recipients claim ITC.

Next up, taxpayers had mistakenly reported B2B sales of Table 4A as those subject to reverse charge in Table 4B of GSTR-1. The department has stated that both these details are populated in the same table of GSTR-2A with a tag on whether a reverse charge applies. The tax official must ensure that taxes are paid on these wrongly reported transactions.

Lastly, the ineligible ITC that a taxpayer availed in one tax period but reversed in any later tax period, upon the issue of ASMT-10, do not have a designated table in GSTR-3B. The tax officials can obtain the transaction list for that tax period containing ITC claims reversals of the current period and past periods as per Table 4(B)(2). They can also cross-check DRC-03 that the taxpayer has filed.

## TO SUM UP:

It is understood that the intention of the law is to check tax avoidance by businesses, and the fact that it is not feasible for the revenue to detect and contain the problem systematically. However, the cascading consequence of doing this in practice and the issues it creates has been undermined. The restriction increases the working capital requirements of the business houses for no fault of theirs.

MSMEs typically suffer unevenness of cash flow. Even a week's delay in payment throws their routine out of gear. A promising auction or offer for materials which would give them higher profitability, will force them to readjust their cash cycles for a few weeks to take advantage of it.

A dealer can no longer assume that the transaction is over when he pays tax and will have to wait for at least 10-15 days to confirm whether he is eligible to receive the input credit for the tax he paid. During this time, buyers may withhold the payment to the supplier, refuse to pay the tax portion, demand bank guarantees to cover the possible risks, etc., leading to multi-step transactions and an increase in both working capital needs as well as the cost of doing business.

Where the buyer has genuinely purchased goods, but either the tax is not deposited by the seller (intentionally or unintentionally) or it is due to some other technical or non-technical reasons and there is no unholy nexus between

them and the same will firmly stand in the court of law. The only thing which must be ensured by the buyer is to verify the validity of GST Registration number of the seller and should be prima facie satisfied about the credentials of the seller.

The fundamental principle SALUS POLPULI EST SUPREMA LEX – meaning welfare of people is supreme of Law, inspired by principle of justice, equity and good conscience, must be ensured to make the slogan Ease of doing Business in practical otherwise the quote by Martin Luther King Jr. that 'Injustice anywhere is a threat to justice everywhere' would triumph in this era and only then can Eleanor Roosevelt quote 'Justice cannot be for one side alone but must be for both' be attained.

*"Natural justice is a compact resulting from expediency by which men seek to prevent one man from injuring others and to protect him from being injured by them."* - Epicurus

