



# DENIAL OF ITC DUE TO MISMATCH BETWEEN GSTR 3B AND 2A – AN ANALYSIS

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**“THE ESSENCE OF LAW LIES IN THE SPIRIT, NOT ITS LETTER, FOR THAT LETTER IS SIGNIFICANT ONLY AS BEING THE EXTERNAL MANIFESTATION OF THE INTENTION THAT UNDERLINES IT”  
– SALMOND**

**T**he golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. An intention to produce an unreasonable result is not to be imputed a statute if there is some other construction available. Where to apply words literally would defeat the “obvious intention of the legislation and produce a wholly unreasonable result” we must do some violence to the words and so achieve that obvious intention and produce a rational construction. Though our standard of drafting is such that it rarely emerges, but a problem may arise where more than one meaning arc available through the words of the statute, that meaning should be chosen which is reasonable and rational.

The 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 Government is making all attempts to break this chain so as to increase their revenues.

Now there are plethora of notices to the registered persons from the GST department disallowing the ITC availed in respective GSTR 3B due to mismatch with GSTR 2A. This article tries to throw light to analyse legal remedies for the genuine hardships faced by the assesses regarding this demand for this mismatch along with interest and penalty. The reasons for mismatch may be due to following reasons:

- a. Non – uploading / delay/ erroneous filing of returns by the supplier.
- b. Delay in claiming of ITC as prescribed within time limit u/s 16(4).
- c. IGST instead of CGST/SGST or vice versa appearing in 2A.

Let us analyse the legal positions and redressals available for the grievances of the registered persons.

## **SECTION:**

Section 16 of CGST Act, 2017 provides the eligibility and conditions for taking the input tax credit. Section 16(1) reads as follows:

“16.(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person”.  
16 (2) 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,–

- (a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;
- (b) he has received the goods or services or both.

**Explanation.** — For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.

(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: Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment.

(3) .....

(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 due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

#### **1. Non - uploading / delay/ erroneous filing of returns by the supplier.**

No liability can be fastened on the purchasing registered dealer on account of non-payment of tax by the selling registered dealer in the treasury unless it is fraudulent, or collusion or connivance with the registered selling dealer or its predecessors with the purchasing registered dealer are established. And thereby 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 transaction is bonafide.

When the recipient is in possession of proper invoices/ documentary evidence and other eligibility conditions are satisfied, the fault of its supplier should not be made as a burden. The principle of *Lex Non Cogit Ad Impossibilia* i.e, The law does not compel a man to do that which he cannot possibly perform. Since the law cannot compel the tax payers to comply with impossible conditions. With the available legal mechanism no recipient can enforce their supplier to file the return , which the department have, other than to put personal pressure on them to file the return.

As per sec 41 of CGST Act, every registered person shall subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger". However, such conditions and restrictions have not yet been prescribed. Further, section 43A of CGST Act is not yet notified to be effective. There is no dispute regarding availment of input tax credit in the monthly GSTR-3B return. Contrary to statutory provisions, the common portal is not allowing the tax payers to file the return without making payment of tax thereby the common portal had restricted the taxpayers in filing the return without making payment of tax thereby barred the tax payers in complying with provision of Section 41 which entitles every registered person to claim ITC in the return filed under Section 39.

Also due to initial stage of implementation of GST extensions have been granted to file the return. Suppose the recipient has availed the credit and respective supplier has filed the return availing extension or after paying late fee and interest can be another reason. Or if the supplier is a composition person or have opted for quarterly return, as a recipient its illogical and arbitrary to ask them to wait for the suppliers return.

The proposal to deny ITC due to procedural lapse is in violation of Article 300A of Constitution of India which states that "No person shall be deprived of his property save by the authority of law". Input tax credit under GST would be treated as a property of the taxpayer therefore the same cannot be denied to the tax payers due to non-fulfilling the procedural conditions.

## **2. Delay in claiming of ITC as prescribed within time limit u/s 16(4).**

Most of the details of input tax credit are already available in GSTR-2A which is available with the department prior to due date prescribed under Section 16(4) and the availment of such ITC would be a mere disclosure in GSTR-3B, therefore, the substantial benefit cannot be denied due to procedural lapse of mere non-disclosure in GSTR-3B within the due date.

Even though the return has been filed belatedly, the late fees and interest would have been paid and the delay in filing return has been regularized - Mr Rashmikant Kundalia vs Union of India W.P 771 of 2014 (Bom.), Howrah Taxpayers' Association Vs. The Government of West Bengal and Anr. 2010 SCC Online Cal 2520. Hence, once the delay has been regularised such returns has to be construed to be filed within the due date. T

Moreover the common portal would have allowed the registered persons to file the returns without making payment of tax which is allowed under the law, then they would have filed the returns within the time limits prescribed under Section 16(4) and would have claimed the ITC as per Section 49 read with Section 41. The main reason behind failure in availing the ITC within the time limit prescribed under Section 16(4) is the common portal which had not allowed us to file the return for claiming the ITC.

It is clear that the Government had not made available the facility to the tax payers to claim the ITC within the time limit prescribed under Section 16(4). Without making the IT infrastructure available to the taxpayers to comply with Section 16(4) and asking them to comply with such sub-section amounts to asking the tax payers to comply with impossible conditions.

## **3. IGST instead of CGST/SGST or vice versa appearing in 2A.**

Error on the part of supplier entering wrong taxes while submitting GSTR 1 also have made the mismatch more wider. In a recently held writ petition Hon. Madras High Court in case of M/s Sun Dye Chem case held in favour of the appellants and the abstract is as follows:

*In the absence of an enabling mechanism, I am of the view that assessee should not be prejudiced from availing credit that they are otherwise legitimately entitled to. The error committed by the petitioner is an inadvertent human error and the petitioner should be in a position to rectify the same, particularly in the absence of an effective, enabling mechanism under the statute.*

*This writ petition is allowed and the impugned order set aside. The petitioner is permitted to re-submit the annexures to Form GSTR-3B with the correct distribution of credit between IGST, SGST and CGST within a period of four weeks from date of uploading of this order and the respondents shall take the same on file and enable the auto-population of the correct details in the GST portal. No costs.*

And thereby its quiet evident that the Honourable judicial system is involving to those genuine hardships and passing orders in favour of assessee.

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 face the wrath of law. Undoubtedly, strict actions to be initiated in case where fraudulent availment of ITC or evasion of tax is being found. A system must be designed to penalise the guilty where as to protect the interest of honest tax payers.

And in short, 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 POPULI 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.