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GST-ON BEAT, OFF-BEAT AND BACK BEAT INPUT TAX CREDIT: DEFAULT BY SUPPLIER

Lot has been written about how to face the issues related to non-payment of GST by supplier as Purchaser has no fault but may land into trouble. In this article we will discuss some of the latest case laws on the same to give some support to only genuine purchaser. Before we move to case laws, let's see legal position on the issue of Non Payment of GST by seller.

Since GST is already collected by Seller, it is supposed to be paid by furnishing proper returns by Seller. Usually we see 2A wherein GSTR 1 filed by Seller is reflected and we are convinced that Seller is about to pay GST collected from us. In reality the taxes are paid while submitting GSTR 3B and the cycle of collection from Buyer and depositing the same to Government is completed. See the following provision of Section 16 on Input Tax Credit

'16. Eligibility and conditions for taking input tax credit.

- (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.*
- (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 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;
 - (c) ***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; 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:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a

period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon'

With plain reading of the Section 16 clarifies that Input Tax Credit (ITC) cannot be taken if Supplier has not paid GST in cash or through ITC and supplier has also furnished the returns. There are plenty of arguments in favour of this section by Department and against by assesses. Let the court decide between the arguments. As many as 3 cases are pending before various High Courts challenging section 16(2)(c). Meanwhile few judgements we must consider here for our reference. These judgements are purely individual case to case basis but the intention of court is very clear.

The main in the list is in the High Court of Madras D Y Beathel Enterprises vs State Tax Officer (Data Cell), Tirunelveli. In this case Purchasers were traders in Raw Rubber Sheets they purchased goods from Charles and his wife by paying proper taxes. Later based on returns filed by seller they took Input Tax Credit but during inspection it was found that Charles and his wife did not pay tax and as per section 16(2)(c) department started their recovery from purchaser i.e. D Y Beathel Enterprises. A very important Para 9 in the said order says " *At this stage, the learned counsel brought to my notice that the press release issued by the Central Board of GST council on 4-5-2018. In the said press release, it has been mentioned that there shall not be any automatic reversal of input tax credit from the buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller. However, reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by the supplier or the supplier not having adequate assets etc.*" So despite of above press release court ordered for enquiry of Charles and his Wife in the said case as enquiry cannot be completed unless they are called as witness. This may be the individual relief granted to petitioner but still section 16(2) is definitely vulnerable to many such cases in future. All assesses can take advantage of this case wherein Witness of Supplier is mandatory in case of such findings of enquiry are recorded.

In another case of Bharat Aluminium vs UOI at Chattisgarh High Court wherein court has refused to give any relief to UOI on recovery except for payment of 5% of total demand made of about 14 Cr. The case is still at nascent stage and next hearing is scheduled in August 2021. These 2 cases are very critical for survival of Section 16 (2) for conditions laid down for taking ITC. Like the Case of Surat Mercantile Association pending before Hon. Gujarat High Court, another similar case challenging validity of Section 16(2) before Hon. Delhi High Court will decide the future of this section. Until then assessee can take credit and ensure that suppliers pay taxes in GSTR 3B. Following steps can be taken by Purchasers;

1. Supply Agreement for indemnification:
2. No Purchases policy until taxes are paid:
3. Compliance Software/ Consultants services:
4. Holding back Taxes Payments:
5. Reward system to Supplier:

The above steps are just indicative and self-explanatory also.

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