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SEC 16(4) OF CGST ACT, 2017 - IS THE HON'BLE APEX COURT'S DECISION IN THE CASE OF ALD AUTOMOTIVE (P) LTD. EQUALLY RELEVANT IN GST REGIME?

GST was introduced in India with a promise of a seamless flow of credit. Dreams were sold that cascading effect of taxes will vanish in thin air once GST is introduced and double taxation would be a story of the past.

GST is structured on a mechanism which facilitates a continuous chain of set off of credit. One can call it the edifice, the core provision or the basic premise. It is the base on which the principle of value added tax is founded. There were imperfections in the earlier Vat and Cenvat regimes so far as these set offs were concerned. There were no cross set off between Vat and Cenvat. In addition some of the taxes paid formed part of the cost. Domain experts and the Government visualised and conceptualised that to eliminate these imperfections as well as to remove the undesirable cascading effects of several taxes levied at multiple points in the manufacturing and distribution chain, GST was the panacea. GST was perceived to help integrate the taxes on a pan India basis through an uninterrupted chain of set off from the level of manufacturers and service providers till the retailers. Naturally hopes swelled up that there would be unbroken and unrestricted flow of credit.

So a day came when the much vaunted, much touted landmark reform in the history of indirect taxation of India was introduced in the form of GST with abundant hope and dream of good days. However, with the honeymoon period being over, the hopes and aspirations started to recede. Dissatisfactions crept in gradually.

The most important area which is arguably the perceived backbone of GST contributed most to this dissatisfaction. The provisions on input tax credit (ITC) somewhat betrayed the high expectations that people had before the introduction of GST. A comparison between the words used in the model GST law and the final statute clearly indicate a shift. The Model GST Laws had titled the section on ITC as 'Manner of taking input tax credit' whereas the CGST Act titled this section as 'eligibility and conditions for taking the input tax credit'. The subsequent change in the title and insertion of the word 'conditions' probably point to the shift in the approach of the lawmakers so far as ITC is concerned.

After four years since introduction of GST, seamless flow of input tax credit still remains a dream. The first compromise was the non-inclusion of petroleum products in GST which continues still now. There

might be some reservations by the States in bringing some of the petro products under GST. Whatever be the reasons, it is definitely one of the stumbling blocks on the smooth flow of credit which gives rise to cascading effect. The same can be said for electricity also. However, the compromise in respect of ITC does not end here. To top it, there are apportioned credits, restricted credits and blocked credits. Some of them are arguably excessive going against ease of doing business.

The last nail in the coffin, so to say, was put through section 16(4) of the Act which seems to be one of the scariest provisions of GST laws and has the potential of putting death knell on many a MSME. It says that the ITC for a particular year is to be claimed by the due date of filing of the return for the month of September of the subsequent year or the filing of Annual Return whichever is earlier. In the event of failure to do this, such ITC is no more claimable which literally means a taxpayer will again have to pay the tax which he had already paid. As expected, this provision has already been challenged in the courts of law.

Whenever the issue is discussed whether section 16(4) would stand the scrutiny of law, invariably the judgement delivered by the Hon'ble Supreme Court in the case of ALD Automotive Pvt. Ltd. vs. The Commercial Tax Officer and others finds a place in this discussion. In this particular case [Civil Appeal Nos. 10412-10413 of 2018] which related to the State Vat regime, the issues before the Hon'ble Supreme Court were the following –

- Whether Section 19(11) of Tamil Nadu Value Added Tax (TNVAT) Act, 2006 violates Articles 14 and 19(1)(g) of the Constitution of India ?
- Whether Section 19(11) is inconsistent to Section 3(3) of the Act ?
- Whether Section 19(11) is directory provision, noncompliance of which cannot be a ground for denial of input tax credit to the appellants?
- Whether denial of input tax credit to the appellants is contrary to the scheme of VAT Act, 2006?
- Whether Assessing Authorities could have extended the period for claiming Input Tax Credit beyond the period as provided in Section 19(11) of TNVAT Act, 2006?

Section 3(3) of Tamil Nadu Value Added Tax Act, 2006 states that the tax payable by a registered dealer shall be reduced by the tax paid on intra state purchases from registered dealers. It thus means that output tax liability will be reduced by input tax credit. Section 19(11) of the Act puts a time limit on availment of such ITC and states that in case any registered dealer fails to claim input tax credit in respect of any transaction of taxable purchase in any month, he shall make the claim before the end of the financial year or before ninety days from the date of purchase, whichever is later.

While delivering the judgement on the above case, the Hon'ble Supreme Court held the following-

- The input tax credit is in nature of benefit/concession extended to dealer under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the Statute.
- The Statutory scheme delineated by Section 19(11) can neither be said to be arbitrary nor can be said to violate the right guaranteed to the dealer under Article 19(1) (g) of the Constitution.
- In the event it is accepted that there is no time period for claiming Input Tax Credit as contained in Section 19(11), the provision becomes too flexible and can give rise to large number of difficulties including difficulty in verification of claim of Input Credit.
- In the scheme of Tamil Nadu Value Added Tax Act, 2006, there is no power conferred on any authority under the Act to dilute the mandatory requirement under Section 19(11).

Let us now humbly analyse the above judgement and try to form an opinion whether the judgement delivered under the TNVAT Act is still relevant in the GST regime or not.

The Hon'ble Court was of the opinion that ITC is not a 'right' and is in the nature of benefit/concession. The judgement in reference also referred to the case of Jayam & Co. vs Assistant Commissioner & another [(2016) 15 SCC 125] wherein the same stand was taken. This particular case came to the Apex Court as Jayam & Co. had challenged the decision of the Madras High Court. In their judgment, the Hon'ble Madras High court had even went to the extent to say that the Input Tax Credit provided under section 3(3) of TNVAT Act was really an 'indulgence'. The Hon'ble High court was of the opinion that the entitlement to 'Input Tax Credit' is created by statute and can be claimed only in terms of the statute.

When we think about the words 'concession' or 'benefit' from a layman's viewpoint, the first thought that comes to our mind is that somebody has been obliged with some sort of allowances, indulgence, help, assistance or special consideration which he is not entitled to and it has been provided to him out of generosity. The poor fellow does not have any claim on it and he is being bestowed with something which is gratuitous. Going by the plain meaning of the words what a layman can make out is that benefit or concession and more specifically 'indulgence' is not a right or entitlement on anything at all and does not automatically become due to anybody. If somebody does not get a benefit or a concession, he does not stand to lose anything because neither he has any right to it nor has he any pecuniary interest on that.

Use of these words in legal terminology might have different meaning and implication. However, the judiciary in their pronouncements, more often than not, emphasizes that literal meaning is to be given to the provisions of law without reading too much into it. If that is so, should we conclude that a benefit/ concession or an indulgence would forever remain so with a perception that the statute has provided us the same gratuitously and this would never become an entitlement or right despite fulfilling all the conditions attached to it? Should we presume that deprivation of the same would not result into pecuniary loss to anybody since it is just a benefit or a concession? In reality, the case seems to be the opposite. Deprivation from input tax credit results into pecuniary loss to a taxpayer since the same tax is to be paid twice and adds to the cost of products which cannot be recovered. Such loss arises not out of any poor business judgment but because of operation of a harsh provision of a law.

There is no arguing the fact that any 'benefit' or 'concession' is to be taken as per the scheme of the statute. Because statute is the medium through which the taxation policy of a country is given the required shape. Taxation policy of a country does not work in vacuum. It needs statutes for its manifestation and administration.

Now the moot question remain – whether ITC in GST is still a benefit/concession or some kind of a deemed entitlement? Have the reasons compelling the introduction of GST been able to change the scheme of the statute?

When Vat was introduced, removal of cascading effect, facilitating interrupted flow of credit and abolition of double taxation were not the decisive factors. Stakeholders were aware that with parallel functioning of Cenvat, State Vat, CST and many other taxing statutes with no cross adjustment of taxes, these imperfections will remain and some of the taxes would form part of the cost. Allowing a portion of such costs as ITC could, for arguments sake, be treated as concession or benefit. However, it is an established fact that GST in India was introduced mainly to achieve a continuous flow of ITC. Domain experts and Governments emphasized time and again that introduction of GST would bring an end to existing imperfections in ITC. Eminent Economists, indirect taxation experts, NCAER, Task force on GST, empowered group of State Finance Ministers and finally the Statement of Objects and Reasons

accompanying The Constitution (One Hundred and Twenty-Second) Amendment Bill, 2014 had a unanimous convergence of opinion that GST is being introduced to remove the cascading effect of taxes.

The Statement of Objects and Reasons accompanying the 122nd Constitution Amendment Bill clearly stated that the Constitution is proposed to be amended for conferring concurrent taxing powers to the Union and the States. Had the scheme of things to end there that would have been sufficient. Rather, the statement went one step ahead and emphasised that GST is intended to remove cascading effects of taxes and provide a common national market. Cascading effect of taxes can be removed as well as common national market can be provided only with an uninterrupted flow of credit across all economic activities.

With this background, nobody had any doubts why GST was being brought. Had seamless flow of ITC not been visualised as the backbone of GST, the purpose of GST would have been lost and there was no necessity to bring in GST. Neither the dream of 'One Nation, One Tax' would have a chance to be materialised. Everybody was assured that in such a scheme of things an interrupted flow of credit was guaranteed under GST and the scheme of the statute would just follow suit and the law would just require formalising and giving a proper shape to the provisions relating to ITC for proper administration. It is therefore clear that for all practical purposes GST statute has not created ITC. It is the other way round. ITC was the need of the day and one of the main purposes for which GST was implemented. The law had just to give the shape to an otherwise decided principle. The background for introduction of GST literally assured that taxpayers that they would be entitled to ITC provided the bona fides of a particular transaction are beyond question and the procedures of such entitlement would be just given a shape through the laws. The duty of the statute was just to facilitate what the country had already decided by not creating any arbitrary provision restricting free flow of ITC if the bonafide of a transaction are not under question. There should not have been any contradiction whatsoever. On the one hand, when the government says that the taxpayers would be entitled to 'A', the lawmaking arm of the government cannot say that 'A' is a concession and will be allowed depending on the sweet will of the statute. Judiciary may say that statute is sacrosanct, but statutes cannot defy the decision of the country which has already been given a shape through an amendment of the Constitution.

Therefore, in the humble opinion of the author, ITC was more of a 'deemed entitlement' even before the statute was created because necessity of a free flow of the same on a pan India basis covering both goods and services resulted in the birth of GST. This was not a concession or benefit since denial of the same would result into a double payment of tax for the taxpayer which would add to his cost. GST was introduced not to facilitate this but to avoid this. In value added tax mechanism, tax does not and should not form part of cost. Moreover, this is also not how the principle of indirect taxation works. This would simultaneously result into unjust enrichment for the government which is unethical, if not illegal. Denial of credit and forcing a payment twice was obviously not in the scheme of things when GST was conceptualised and ideally should not have been in the scheme of statute also.

In the case of **Siddharth Enterprise vs. the Nodal Officer** [Special Civil Application No. 5758 of 2019], Hon'ble Gujarat High Court in the matter of transitional credit held that CENVAT credit earned under the erstwhile Central Excise Law is the property of the writ-applicants and it cannot be appropriated for merely failing to file a declaration in the absence of Law in this respect. The Hon'ble Court is very clear here that Cenvat credit earned under the erstwhile Central Excise Law is a 'property' and right to it is a Constitutional right.

As already stated, the subject judgement of ALD Automotive delivered under the Vat regime did not recognise ITC as a right. Under the changed scenario and the context in which GST was introduced, the question can easily be repeated whether ITC is still a concession or a right?

It appears from a perusal of section 16 of CGST Act which covers eligibility and conditions for taking input tax credit that a right on input tax is created when a taxpayer fulfils all the conditions specified in section 16(2) which has been drafted as a non-obstante provision. And to use the words of the Hon'ble Apex Court, this right can be earned by the beneficiary only as per scheme of the statute. However, imposition of a time limit through section 16(4) would supersede or override this scheme of the statute since operation of section 16(4) makes the non-obstante section 16(2) meaningless. Section 16(2) has overriding effect on section 16(4) and section 16(2) has been drafted in a manner which shows clear legislative intent that it is not subject to section 16(4).

Section 16(1) and section 16(4) both use the words 'entitled to take credit whereas section 16(2) uses the word 'entitled to credit'. Entitlement to a particular right after fulfilling the prescribed and specified conditions results into a right. 'Taking' or availing or utilising that right through procedural formalities of furnishing a return by the person who is entitled to that right is a matter of his choice. The right of entitlement to input tax credit provided through section 16(2) is supreme and sacrosanct in the sense that section 16(2) overrides other sub-sections of section 16 and does not make the entitlement subject to any other sub-sections particularly sub-section (4). Thus entitlement under section 16(2) does not have a time limit and gives a right.

A reading of section 16(4) vis-a-vis section 16(1), which can be said to be the operative provision, reveals two issues. First, section 16(1) has not mentioned any 'time limit' or 'time element' in the section. Nowhere does it mention phrases like 'subject to time limit' or 'within such time limit'. Reference for the same can be drawn to the decision of the Apex Court in the case of Sales Tax Officer, Ponkunnam and another vs. K. I. Abraham [AIR (1967) SC 1823]. Moreover, there is no visible linkage of this sub-section with sub-section (4) also. Nowhere does it mention 'subject to sub-section (4)' or any such words. Sub-section (1) has left section (4) to be standalone and forceful creation of a relation between the two is stretched interpretation. Similarly, based on the provisions of a non-obstante sub-section (2), entitlement of input tax credit and getting a vested right there on after having fulfilled all the conditions mentioned therein is also not subject to operations of other sub-sections particularly sub-section (4). Accordingly, where there is an entitlement under sub-section (2) and such entitlement has been duly earned and converted into a vested right after fulfilment of the required conditions, the same cannot be restricted putting a forcible time limit as the law has not made such entitlement and subsequent right subject to provisions of some other sub-sections particularly sub-section (4). The way provisions of sub-sections (1), (2) and (4) have been drafted, encroachment of provisions of sub-section (4) into an otherwise valid and legal entitlement of ITC under the provisions of a non-obstante sub-section (2) should be bad in law as sub-section (4) cannot limit the scope of sub-section (2). The final words therefore can be put in this way that section 16(4) does not prevail over section 16(2) and sub-section 16(2) is not subject to sub-section 16(4). And with this changed scheme of statute and in the context and the background in GST was introduced in India, ITC should be no more a benefit or a concession or an 'indulgence'. Withdrawal of an 'indulgence' which is obviously not a right does not result into pecuniary loss but denial of 'input tax credit' which is a right results into pecuniary loss and financial stress on a taxpayer.

In the case of **Eicher Motors Limited and another vs. Union of India and others** the Court observed that Modvat credit is in the nature of a facility of credit which is as good as tax paid till tax is adjusted on future goods. It was further observed that the right to the credit has become absolute at any rate when the input is used in the manufacture of the final product. The Court said that a credit under the MODVAT scheme was "as good as tax paid". It is as good as saying that ITC is a vested right.

The Hon'ble Court also held in the ALD Automotive case that the statutory scheme delineated by Section 19(11) of TNVAT Act neither can be said to be arbitrary nor can be said to violate the right guaranteed to the dealer under Article 19(1) (g) of the Constitution.

While the merit of section 16(4) probably is not going to be challenged under Article 19(1)(g) of the Constitution which gives a fundamental right to practice any profession or to carry on any occupation, trade or business, this might be challenged under Article 300A which gives a right on property. Section 16(4) can be challenged on the ground of its being arbitrary for reasons already discussed. It can be challenged under Article 14 also.

What basically makes a provision of a law arbitrary? When enunciating the doctrine in ***Sharaya Bano v Union of India***, Nariman J. said that a provision of law would be manifestly arbitrary if it lacked a clear determinative principle or encapsulated a capricious or irrational measure (Para 55). A non-obstante provision similar to section 16(2) was not there in sec 19 of TNVAT. Accordingly, section 3(3) and section 19(11) could be interpreted harmoniously as nothing superseded anything neither was there any contradiction. However, section 16(4) of CGST Act seems arbitrary in the sense that it is making a non-obstante clause toothless, meaningless and helpless. If this is not irrational, what else is?

In the case of **Siddharth Enterprise vs. the Nodal Officer** already mentioned above the Hon'ble Court also held that the liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and, therefore, it is arbitrary and irrational. This write up is also trying to drive home the point that double taxation on same subject matter and transaction because of application of provision of section 16(4) is arbitrary and irrational.

As stated, the basic difference between section 19(11) of TNVAT Act and section 16(4) of CGST Act is that while section 19(11) was not superseded or challenged by any non-obstante provision, section 16(4) is superseded by an overriding section 16(2) which provides the entitlement and right over ITC and the operation of section 16(2) is not subject to some other provisions.

The subject judgement of ALD Automotive also stated that provision of a statue is not to be read in isolation. Indeed, provisions are to be read and interpreted harmoniously if there are no conflicts between such provisions. Section 19(11) could be read harmoniously along with charging section 3(3) as there were no conflicts between them. However, even if the four sub-sections of section 16 are read harmoniously, the dominant non-obstante sub-section (2) needs to be in the forefront. If that is not so, the statute should not use a non-obstante clause at all while drafting a law because presence of a toothless non-obstante clauses does not speak high about a law.

The subject judgement also said that it is in the domain of the legislature as to how much tax credit is to be given under what circumstances. Fair enough. But in doing so, can the legislature draft such provisions which breaks the edifice or purpose of such legislation or go against a decision which a country had already made?

The judgement also mentioned that law related to economic activities should be viewed with latitude. Having agreed to this viewpoint, in taxpayers and common citizens' defence it can also be said a fiscal law should be concerned more with its economic impact than the legal aspect. A legal loophole can be repaired but it is difficult to undo an undesirable economic effect.

Many a times, the lawmakers, the Hon'ble courts and the professionals tend to only look at the legal angle of a particular law or a particular provision of a law. So far as judiciary is concerned, there is no arguing the fact that one of the major functions of the judiciary is to interpret and apply laws. Judiciary also carries on their shoulders the responsibility of providing justice to a common citizen and protect his rights given by the Constitution. However, prima facie the courts are under no obligation to measure or quantify the possible impact of a particular provision of law on the economy of the country. Nor is the judiciary supposed to be excessively concerned about the economic impact of the decisions made by them. They are supposed to act as guardian of the constitution, protector of fundamental rights of the citizens and provide administration of justice.

However, one would still be inclined to say that the impact of taxation laws is farfetched. Taxation laws are not merely a set of sections, sub-sections, clauses, rules and sub-rules. It is not about some conditions, restrictions and procedures. It probably would not be an overstatement if it is said that taxation laws are one of the vision documents of economic prosperity of a country. It is not a merely revenue generation tool.

Taxation laws should be equitable and of course, it should not be violative of constitutional rights of the citizens. A taxation law is not a good law if it proves to be burdensome on the common citizen, if it stifles economic activity, if it creates roadblocks in ease of doing business. A law, particularly the one that guides the economy of a country and which claims to be a big reform, should not be measured only on the criteria whether some provisions of it would stand the legal scrutiny or not but on equally important criteria whether it is contributing to the ease of doing business, to the growth of the country and whether it is causing undue hardship on taxpayers and common citizen alike.

The Hon'ble Apex Court in the subject judgement further stated that if it is accepted that there is no time period for claiming Input Tax Credit as contained in Section 19(11), the provision become too flexible and give rise to large number of difficulties including difficulty in verification of claim of Input Credit.

During the Vat regime, none of the states had a robust back end IT infrastructure. Data mining and fruitful MIS was not easy to be performed. Neither was there any Artificial Intelligence (AI). In those circumstances, a lot depended on manual operations and therefore reconciliation or data matching was not an easy task to perform. Accordingly, a shorter time limit under such circumstances was probably warranted. However, it is also to be noted that barring Tamil Nadu no other state had any time limit restriction on availment of input tax credit. At that time, most of the States did not have strong IT backup either. This restriction of ITC was a unique case with Tamil Nadu only. It would be illogical or would possibly be bereft of fact to assume that other States had lesser legal or practical knowledge not to include this provision into their statute and ultimately faced humongous problems in completing their assessments. Since a particular state had only used this provision and no other states resorted to this, it gives enough scope to believe that no other States felt any necessity to burden the taxpayers with such a harsh provision. Neither did it come to notice that any of the States faced huge problems in data matching and assessments.

GST regime fortunately has the potential to create a robust IT back end infrastructure. Initial hiccups or continued shortcomings of GST common portal notwithstanding, the IT infrastructure of GST have the potential to handle verification of ITC and related issues for a comparatively longer period of time and with more precision. Data in the form of GSTR-1, 2A are already available with the government. Therefore, restricting the time to avail ITC for such reasons is not perceived to be a wise decision at all under the GST regime. In fact, if the Govt. has resolutely followed the GSTR 1-2-3 scheme, such issues would not probably have arisen. Late fees and interest are already there as deterrent for the taxpayers forcing them to be disciplined. Punishing them with double payment of tax through section 16(4) is nothing but arbitrary and capricious.

The Court also stated that in the scheme of Tamil Nadu Value Added Tax Act, 2006, there is no power conferred on any authority under the Act to dilute the mandatory requirement under Section 19(11).

That could be the case with TNVAT Act but the GST laws clearly give this power to the lawmakers by virtue of section 174 and in fact the time limit stated under section 16(4) was extended for the year 2017-18 by inserting a proviso to section 16(4) by the Central Goods and Services Act (Second Difficulties of Removal) Order 2018 w.e.f. 31-12-2018. If there is a precedent, there could be a subsequent also.

In the humble opinion of the author, it therefore appears, that the legal grounds or the scheme of the statute on which the above judgement was delivered, have definitely not been the same under the GST regime and this subject decision may not still remain overwhelmingly relevant considering the compelling background for introduction of GST and a changed legal scenario as well as the scheme of the statute.

The purpose of this write up was to highlight the salient features of the judgement delivered by the Hon'ble Apex Court in the case of ALD Automotives (P) Ltd. vs. Commercial Tax Officer and whether the stand taken by the Court would still hold its ground under the GST regime. Section 16(4) may or may not pass the legal scrutiny but as of now one thing can definitely be pronounced in the court of taxpayers and professionals that its negative impact on small and medium businesses would be far reaching. It has all the potential to destroy a lot of them resulting into unpalatable effect on the economy. GST was visualised, planned, drafted and implemented with a promise of continuous chain of set-off and free flow of credit. Legal merits or demerits of Sec 16(4) notwithstanding, the very existence of section 16(4) are a betrayal of that promise. This provision is not less than a nightmare for the taxpayers migrated from State Vat because apart from Tamilnadu, no other state had this dreaded provision. This provision has its genesis to Cenvat rules and in terms of sheer numbers Cenvat taxpayers would not form even a tiny portion of Vat taxpayers.

From the taxpayers' point of view, the time to write an obituary for the much hyped 'seamless flow of credit' has probably not yet come but the way things are moving, a long 'pause' button should definitely be pressed in its glorification. It is very disheartening to note that ITC in its present form was never visualised under GST or at least the taxpayers were never made to believe that it would take such an unfriendly form. Lawmakers must realise that no taxation laws can bring economic prosperity by putting unbearable financial and compliance stress on small and medium taxpayers. Yet, there is a smokescreen that GST Amnesty scheme has been announced which would benefit non-filers, however, any such scheme without simultaneous relaxation in section 16(4), to put it mildly, is a death trap. ITC has no more remained Input Tax Credit, it has now become Incredibly Tough Compliance.