

Webinar on

Legality of Section 16 (2)

of CGST Act, 2017 - Challenged



Presented by:

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Section -16 CGST Act, 2017

Section 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.

*** Rule 36 to 41A and 42 TO 45 CGST Rules -2017**

- (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.....

***Rule 36 of CGST Rules, 2017**

- (c) subject to the provisions of section {41 or **sec 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**:

*** To be notified by a notification (Ref CGST (Amendment) Act, 2018 Sec. 8(b)).**

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

(3) Where the registered person has **claimed depreciation on the tax component of the cost** of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961, the input tax credit on the said tax component shall not be allowed

(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.

*** March, 2019 vide Order No 2/2018 dt 31.12.2018 for the F/y 2017-18**

CASE LAWS:

Legality of Section 16(2) - challenged

Decided Case

Arise India Ltd v/s Commissioner Of Trade & Taxes,

... on 26 October, 2017

Appeal Number : W.P.(C) 2106/2015

Date of Judgement/Order : 26.10.2017

IN THE HIGH COURT OF DELHI;

The Hon'ble High Court of Delhi held Section 9(2)(g) of Delhi VAT Act to the extent it disallows Input tax credit (ITC) to purchaser due to default of selling dealer in depositing tax, as violative of Articles 14 and 19(1)(g) of the Constitution of India.

This is violative of Article 14 of the Constitution in as much as it treats both the innocent purchasers and the guilty purchasers alike. In other words, it is submitted that by treating unequals equally the legislative measure is violative of Article 14 of the Constitution

There are other statutory avenues available to the State to collect tax from the defaulting dealer

Case:2

LGW Industries Limited & ors. Vs. Union of India & ors. (Calcutta High Court)

W.P. No. 23512 (W) of 2019, dt 08.01.2020

- wherein the petitioner has challenged the constitutional validity of Section 16(2)(c) of the [CGST Act](#)/[WBGST Act](#), which seeks to deny ITC to a buyer of goods or services, if the tax charged in respect of supply of goods or services has not been actually paid to the Government by the supplier of goods or services
- the ground that denying ITC to a buyer of goods and services would tantamount to treating both the '**guilty purchasers**' and the '**innocent purchasers**' at par whereas they constitute two different classes
- shifting the incidence of tax from the supplier to the buyer, over whom it has no control whatsoever, is arbitrary and irrational & therefore violative of the Article 14, Article 19(1)(g) and Article 300A of the Constitution of India

- It would also clearly frustrate the underlying objective of removal of cascading effect of tax as stated in the Statement of object and reasons of the **Constitution (One Hundred And Twenty-Second Amendment) Bill, 2014**
- in the absence of any finding about petitioners mala fide intention, connivance or wrongful association with the suppliers, no liability can be imposed on it on the principle of vicarious liability on account of fraudulent conduct of the suppliers, who have obtained registration on the basis of fictitious documents

Legality of Section 16 challenged

- **Bharti Telemedia Ltd. Vs. Union Of India & Ors.** (Delhi High Court) W.P.(C) no 6293/2019,
- The Petitioner i.e. Bharti Telemedia Ltd. is engaged in providing Direct-To-Home satellite television broadcast services
- Delhi HC issues notice in writ petition challenging Section 16(2)(c), second proviso to Section 16(2)(d) and proviso to Section 16(4) of Central Goods and Service Tax Act, 2017 (CGST Act); Validity of Section 43A(6) of CGST Act, **which hasn't been notified yet**, is also being challenged;
- Petitioner's contention is that the Department has been vested with all the powers to recover any revenue lost owing to non-payment of taxes by erring suppliers and credit cannot be denied to recipient for default on part of the supplier;

Legality of Section 16 challenged

- Further, As per the verdict of the [Hon'ble Gujarat High Court in the case of AAP & Co. Chartered Accountants v/s Union of India \[R/Special Civil Application No. 18962 of 2018 dated June 24, 2019\]](#), it was held that GSTR 3B was not a return in lieu of GSTR 3 specified u/s 39 of [CGST Act, 2017](#)
- [Notification No. 49/2019 – Central Tax dated 9th October, 2019](#) was issued which amended Rule 61(5) of the CGST Rules providing that GSTR 3B shall be a return u/s 39 of CGST Act, 2017 and such rule is **amended retrospectively with effect from 1st July, 2017.**

THANK you