



## **Artificial Blocked Credit - is it unfair or illegal?**

**CA Madhukar N Hiregange  
CA Arjun**

The concept of self-assessment in tax administration was introduced in India with an expectation to usher in a new era of trust-based partnership with the assessee leading to a greater facilitation of compliant assessee.

“Circular Trading”, “Fake Bill issue”, “enhanced bill” unfortunately are methods of tax evasion not new in India. Under GST bogus invoices are raised without any actual supply of goods or services or both in several stages culminating finally in no supply or part supply. In some cases materials are sold in cash to the unorganised or those who do not avail ITC [ Residential Housing or Hotel Industry] and the bill without supply is given to the tax evaders who wish to claim credit [ Commercial construction or hotels availing ITC. At times in Circular / fake bill trading, the goods manufactured/ imported without paying due taxes are supplied to the customer and a fake invoice is provided to cover the same quantity. Based on such bogus invoices, the registered persons who were recipients were claiming ITC.

There are 2 categories of recipients:

- a) those who are involved in claiming ITC for goods not received or short received. These are the persons who need to be bought to book. There is a move to make them equally responsible which is good.
- b) those who buy goods duly received from market from traders and pay for the same. They are not aware of how the trader is paying his tax. They cannot and should not be made responsible.

Reports were issued by the Government that there were `11,251 crores of ITC fraud due to circular trading in F.Y 2018-19. To curb availment of ITC on fake invoices and circular trading the Government is proposing a series of amendments to the law through rule where the legal validity would be questioned by the bona fide compliant tax payers. A good instrument to a bad musician would ruin the music, pari materia, a good law with bad implementation would ruin the law, make ease of doing business difficult and also end up in avoidable litigation.

Method of implementation has been the area lacking. This time around suggestion is to provide clarity and awareness about the types of evasion including FAQs where the



scenarios where the availment of ITC would be treated as fraudulent and where not made clear with illustrations. This would aid compliant tax payer to be vigilant and guard against goods supplied properly along with fake invoices with ITC.

In this article, we would analyse the amendment made in the CGST rules, 2017 by inserting Rule 86A to curb the fake invoices and circular trading.

### **Amendment in CGST Rules**

In the month of December 2019, CBIC vide notification no.75/2019 C.T dated 26<sup>th</sup> December 2019 had inserted Rule 86A which empowers the commissioner or any other officer authorised by him not below Assistant commissioner (herein referred as “Proper Officer”) having REASON TO BELIEVE that ITC has been availed FRAUDULENTLY or INELIGIBLE in as much as –

- a. Credit availed on invoices issued by registered person who found to be non-existence or not conducting any business from the registered place of business;
- b. Credit availed on invoices issued without any receipt of goods or services; (Circular Trading);
- c. Credit availed on invoices in respect of which tax has not been paid to the Government; (2A vs 3B)
- d. Availment of credit without any documents prescribed under section 16 r/w rule 36;
- e. Person availing credit found to be non-existent or not to be conducting any business from the registered place of business;

With reasons to be recorded in writing, deny the registered person neither to use the electronic credit ledger to pay off his liability nor to claim refund of such unutilised amount.

Once the credit ledger has been blocked, then the registered person has to prove that the conditions aforementioned do not exist to the proper officer. He may on satisfaction allow the registered person to use the credit ledger.

Once the restriction i.e. denial is imposed on the registered person such restriction holds goods for a period of one year from the date of such restriction.

### **Analysis of such amendment**

1. The generally accepted principles of the law are that “Rules cannot override the Act” and rule cannot operate independently, it has to be read along with the Act.



- However, in relation to rule 86A, none of the provisions of the Act provides the power for such rule. In case of ***Intercontinental Consultants and Technocrats Private Limited v. Union of India 2018(10) G.S.T.L 401 (S.C)*** it was held that – rules cannot go beyond the statute, in case of conflict with the main enactment, the rule has to give way. Further, rules are framed for achieving the purpose behind the statute.
2. Once the credit entitled to be taken as per section 16 of CGST Act, 2017 has been availed becomes an indefeasible right of the registered person. The department does not have built in powers / authority to stop a registered person from availing and utilising the credit under the law. However, they may recover, deny the refund of availment of ineligible credit through the proceedings prescribed under the law. Once the credit has been legally availed in the returns, it becomes the righteous property of the assessee. Further Article 300A of Constitution of India provides that - No person shall be deprived of his property saved by the authority of law unless it is in accordance of the law
  3. The amendment fails to provide the procedure to be followed by the proper officer for enforcing his powers conferred under the newly inserted rule which may create havoc in the trade & industry.
  4. The language used in rule 86A can lead to interpretational disputes. For instances,
    - a. In reference to word reason to believe, there several settled cases under Income Tax Act to infer the actual meaning. The belief should be in a good faith, it can't be a pretence, further the reasons to make such belief should be objective i.e. there should be proper evidences with the officer to believe stronger than the satisfaction. There should a written evidence in the internal files. [ One can get a copy under RTI to confirm if there is a doubt about it]
    - b. In reference to the word Fraud – the intention to evade tax is built in the word. Further a positive act with the intention to evade the tax has to be established – Case law reference – ***Cosmic Dye Chemicals vs. CCE, Bombay 1995 (75) ELT 721 (SC), CCE v Chemphar Drugs and Liniments 1989 (40) ELT 276 (SC).***

Assuming even if the rule is backed with the provision from the Act, the above cited reference would give a clarity that for invoking actions as per the rule, the officer has to collect proper evidences to have a belief that the registered person has done a positive act with an intention to evade tax.



- Important to note that the powers of the rule as per the first condition cannot be enforced on registered person who have not availed input tax credit other than in fraudulent manner.
5. Further, rule prescribes the procedure that the proper officer would block the electronic credit ledger for utilisation for payment of tax or for claiming refund and subsequently, the registered person has to prove to the officer that such conditions prescribed under rule 86A do not exist and the such restriction imposed by the proper officer would be valid for one year from the date of such restriction. The rationale provided in the rule is squarely invalid and the recovery proceedings cannot be initiated prior to following the principles of natural justice. Case laws in this regard are ***The Union of India vs Mrs. Prashanthi (Kar), Dabur India Ltd. v. State of Uttar Pradesh – 1990 (49) E.L.T. 3 (S.C.), L.C. Infra Projects Pvt Ltd Vs UOI 2019 (28) G.S.T.L. 3 (Kar.), Godavari Commodities Ltd VS UOI 2019-TIOL-2818-HC-JHARKHAND-GST.***
  6. The conditions a, b, d, e aforementioned seems quite reasonable for the case of availment of credit with mala fide intention which has to be identified by the proper officer with proper evidences prior to proceeding enforcing the power conferred under the rule which is unconstitutional and invalid provision in our view.
  7. However, the condition c - “Credit availed on invoices in respect of which tax has not been paid to the Government” – seems to be impossible condition to be kept track off by the registered person. When the Government itself of incapable ( with the entire IT infrastructure in place) to implement the envisaged return process as per the law, expecting the tax payer to keep track of payment of tax by the supplier seems to impossible – ***Force Majeure clause*** may be considered and the such condition could be omitted for satisfying conditions to take input tax credit – principle can be implied that a contract to do an impossible act is void. Court would rule that impossibilities cannot be enforced.
  8. Inserting this condition in rule 86A would disrupt the business since the revenue would start blocking the electronic credit ledger for frivolous reasons like non-matching of ITC as per 2A and 3B. There can be several genuine reasons that 2A and 3B may not match. Further, 2A does not provide conclusive evidence that the supplier has paid such tax to Government.
  9. Such condition would lead to issuance of bulk notices by the department to the assesseees and blocking of credit ledger without even analysing the genuine reasons of difference which creates more room for harassment by the department towards compliant taxpayers.



10. The Government should give importance in IT infrastructure i.e. Risk management system in order to categorise the risk prone taxpayers and intended restrictions can be imposed on risk prone taxpayers. The general small-medium taxpayer has to be let free to concentrate actually on their business. Tax has to be levied on business and the business should not be carried on in order to pay tax.

### Conclusion

The department is implementing restrictions through rules without considering ground realities of type of action possible by officers and the fact that honest tax compliant assesseees should not be harassed. The Rule 36(4) whereas is under section 43A which is **not yet notified!!** The intention of the Government is bona fide to curb usage of fake bills and prosecute the tax evaders. However, implementation of these kinds of unviable and unconstitutional restrictions would affect the major compliant taxpayers. The cost of the lock should not exceed the value of the item which it should protect. The present restriction imposed on all taxpayers would definitely disrupt the business and lead to avoidable cost. Further, providing more and more powers, discretion to errant officers would lead to a reversal from self-assessment and a backward step.

The tax has to be collected from people like honeybee extracts nectar from flowers without harming it. Continuous imposing of such restrictions would eventually lead to invoking of Article 19 of Constitution of India which provides the freedom to freedom of practicing any profession or to carry on any occupation, trade or business subject to reasonable restriction imposed by laws and Article 21 of Constitution of India which provides "No person shall be deprived of his life or personal liberty except according to procedure established by law."

For any further queries/comments please write to  
[madhukar@hiregnage.com](mailto:madhukar@hiregnage.com)/[arjun@hiregnage.com](mailto:arjun@hiregnage.com).

**Our Locations: Bangalore | Hyderabad | Visakhapatnam | NCR (Gurgaon) | Mumbai | Pune | Chennai | Guwahati | Noida |**

[www.hiregange.com](http://www.hiregange.com)