

Time limit to avail ITC in Section 16(4)- GST and recent judgements

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Background

Section 16(4) of GST act, provides that, *“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][omitted wef 1.1.2021] such debit note pertains or furnishing of the relevant annual return, whichever is earlier.”*

This provision denies the entitlement to take credit after the due date of return under section 39 for the month of September following the respective financial year or filing of annual return for the respective financial year, whichever is earlier. Further this date has been extended till 30th November w.e.f. 01st Oct 2022.

Section 16 sets out the eligibility and conditions to take ITC. In section 16(1) Every registered person shall, subject to such conditions and restrictions prescribed and as specified in section 49, be entitled to take credit of input tax charged on supply of goods or services which are used or intended to be used in the course or furtherance of business. In Section 16(1) of the GST Act, there is no mention of any time limit and no link of Sub-section (1) with Sub-section (4) of Section 16.

The fundamental question which comes up is that when conditions for availment of credit are satisfied as set out in section 16(2), can section 16(4) be cited to deny the credit at all? For which we have to look at the conditions to be satisfied by registered person set out in section 16(2) as under:

- a. In possession of tax invoice / debit notes / other documents prescribed under rule 36 of CGST Rules;
- b. Have received the goods and/or services;
- c. Tax charged has been paid by vendor.[Note-The condition to track whether the tax charged in respect of the inward supply has been actually paid to Government seems impossible as there is no invoice level linkage with GSTR-3B of the supplier as it is a summary return].
- d. Has filed the return under section 39 of CGST Act, 2017.

[(aa) the details of the invoice or debit note has been furnished by the supplier in the GSTR 1 and such details have been communicated to the recipient in GSTR 2B*][*inserted wef 1.1.2022]

- e. [(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted**;][**Inserted by FA 2022;]

Further section 16(2) starts with non-obstante clause, “Notwithstanding anything contained in this section”.

The general purpose of a non obstante clause has been explained in a plethora of decisions. In *Union of India v. G.M. Kokil and others* [1984] (Supp) SCR 196] it was observed thus: “It is well-known that a **non obstante clause is a legislative device** which is usually employed to **give overriding effect to certain provisions over some contrary provisions** that may be found either **in the same enactment** or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.”

In other words, contention can be taken that Section 16(2) has overriding effect on Section 16(4) as is evident from the words used in the statute, “entitled to take credit”. Thus, it is contended entitlement of a particular right after fulfilling the prescribed and specified conditions results into a right, “taking” or “availing” or “utilizing” that right through procedural formalities or furnishing a return by the person who is entitled to that right is a matter of his choice. Further, in Section 16(1) of the GST Act, there is no mention of any time limit or time element and there is no visible linkage of Sub-section (1) with Sub-section (4) of Section 16.

There are instances where tax payers would have delayed in filing the GSTR 3B and resulting into availing input tax credit pertaining to preceding financial year post the due date of furnishing GSTR 3B returns for for September for succeeding year[post 30th November of succeeding year wef Oct 2022 onwards].

In such cases, Department is demanding the reversal of ITC along with Interest as the credit of previous year is availed after the time limit provided in Sec 16(4).

Hence there have been spate of demand notices demanding to reverse/pay back the credit availed post such due dates, pertaining to preceding year. Also there were numerous High Court decisions in this regard.

In this article the paper writer has examined the relevant decisions wrt 16(4) as well as the validity of credit availed post such due dates.

Analysis of Time limit under section 16(4)

- Nowhere in the GST law it had been prescribed that the entitlement to credit comes only through availing credit through GSTR-3B.
- Section 41 of GST law provides the procedure to avail the eligible (i.e. entitled under section 16 of CGST Act) input tax in the return of a registered person.
- When assessee has filed the return under section 39[GSTR 3B] of the CGST Act, 2017. Even though it has filed belatedly GSTR-3B it has paid late fees and still considered to be satisfying this condition as the provisions uses the word “under section 39” and not “as per section 39”[in the section 16(4) as it stood till Sept 22]. Further, by virtue of paying late fee, 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

- Input Tax Credit is not taken through the return but it is taken through the books of account immediately, within time limit, on receipt of goods and services.
- When input tax credit prior to such due dates in the books and most of such details of such input tax credit are reflected in the GSTR-2A, hence assessee shall not be restricted under the provision of section 16(4) for ITC entitlement.
- Further, in 2019 (365) ELT 536 Bharat Petroleum Corporation Vs. Commissioner of C.Ex. Mumbai it was held that “*In these circumstances, we are of the view that the Cenvat credit **cannot be denied only due to the delay in taking the credit**, however, the facts regarding receipt and use of the inputs needs to be verified, which can be done on the basis of private records and the books of account maintained by the appellant. **If it is found that all the inputs on which the credit was availed even though belatedly but have been accounted for in the private records and books of account then the credit cannot be denied.** With these observations, we set aside the impugned order and remand the matter to the adjudicating authority for passing a fresh order’*”
- Hence, based on the above grounds, the paperwriter is of view that the credit availed by assesses would not get restricted under section 16(4) of CGST Act, 2017.

Judgements with regard to section 16(4):

In Thirumalakonda Plywoods Vs Assistant Commissioner (Andhra Pradesh High Court) W.P.No.24235 of 2022:

Facts: In view of the petitioner being new to business and started the same in the wake of COVID-19 pandemic, he could not file returns of March 2020 in time and with much difficulty he filed optional form of GSTR3B of March 2020 by 27.11.2020 and paid late fee of Rs.10,000/-.

Held as follows: (i) The time limit prescribed for claiming ITC U/s 16(4) is not violative of Articles 14[**Equality before law**], 19(1)(g)[**provides all the citizens of the country the right to practice any profession, or to carry on any occupation, trade or business.**] and 300-A[**no person shall be deprived of his property save by authority of law**] of the Constitution of India. (ii) Section 16(2) has no overriding effect on Section 16(4) of the said Act as both are not contradictory with each other. They will operate independently. In the present case both Section 16(2) and (4) are two different restricting provisions, the former providing eligibility conditions and the later imposing time limit. (iii) Mere acceptance of Form GSTR-3B returns

with late fee will not exonerate the delay in claiming ITC. Collection of late fee is only for the purpose of admitting the returns for verification of taxable turnover of the petitioner but not for consideration of ITC. Such a statutory limitation cannot be stifled by collecting late fee.

In Gobinda Construction, Patna High Court wherein [CWJC No. 9108 of 2021 dated September 8, 2023] a similar challenge was made to Section 16(4) of the Bihar GST Act, 2017 wherein the Court held as follows:

- that in the language of Section 16 does not suffer from any ambiguity and clearly stipulates grants of ITC subject to the condition and restriction put therein.
- It was held that the right of registered person to take ITC under Section 16(1) becomes a vested right only if the conditions to take it are fulfilled, free of restriction prescribe under Sub Section (2) thereof.
- The court held that the provision under Sub Section (4) of Section 16 is one of the conditions which makes a registered person entitled to ITC and by no means Sub Section (4) can be said to be violative of Article 300A of the Constitution of India.
- The court noted the decision in ALD Automotive Private Limited[(2019) 13 SCC 225], Godrej and Boyce Manufacturing Private Limited vs Commr of Sales Tax (1992) 87 STC 186 (SC) and Jayam and Company (2016) 96 VST 1 (SC) and ultimately upheld the Constitutional validity of Section 16(4) of the Act.
- Note-In ALD supra Section 19(11) of Tamilnadu VAT Act, 2006 which imposes time limit for claiming input tax credit was challenged on the ground that it was arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India. In that context SC upheld the time prescription U/s 19(11) of the said Act.
- In Godrej and Boyce supra, in context of set off of purchase tax, the Court held that the rule-making authority can provide curtailment while extending the concession.”
- In Jayam & Co. Vrs. Assistant Commissioner, supra the Hon’ble Supreme Court observed that input tax credit is a form of concession provided by the Legislature which can be hedged with conditions.

BBA Infrastructure Limited vs Senior Joint Commissioner Of State Tax And Others (MAT No. 1099 Of 2023) Calcutta High Court. The Input Tax Credit availed by the appellant amounting to Rs. 28,65,780/- from the period from November, 2018 to March 2019 was denied on the ground that the returns for the said period was filed beyond the statutory time limit stipulated in Section 16(4) of the GST Act[that is on 29.10.2019], which time limit expired on 20.10.2019.

Held: Relying upon the judgement in the case of Thirumalakonda Plywoods supra further noted that, the similar issues in relation to the present case were taken into consideration by

the Hon'ble AP High Court, where the pari-materia provisions under the AP GST Act, namely Section 16(4) of the Act was challenged on the ground that, the said provision is violative of Article 14, 19(1)(g) and 300A of the Constitution of India.

Section 16(2) does not appear to be a provision which allows Input Tax Credit, rather Section 16(1) is the enabling provision and Section 16(2) restricts the credit which is otherwise allowed to the dealers who satisfied the condition prescribed the interpretation given by the court that the stipulation in Section 16(2) is the restrictive provision is the correct interpretation given to the said provision.

A similar challenge was made to Section 16(4) of the Bihar Goods and Services Taxes Act, 2017 in the case of a Gobinda Construction wherein the court held that in the language of Section 16 does not suffer from any ambiguity and clearly stipulates grants of ITC subject to the condition and restriction put therein.

Further it was held that the right of registered person to take ITC under Section 16(1) becomes a vested right only if the conditions to take it are fulfilled, free of restriction prescribe under Sub Section (2) thereof.

Further the court held that the provision under Sub Section (4) of Section 16 is one of the conditions which makes a registered person entitled to ITC and by no means Sub Section (4) can be said to be violative of Article 300A of the Constitution of India.

Thus, for all the above reasons, find no ground to grant the relief sought for by the petitioner in the writ petition Consequently appeal and writ petition dismissed.

The Hon'ble Supreme Court of India in the case of Mrityunjay Kumar v. Union of India [SLP (C) No. 28270 of 2023] issued notice vide order dated January 3, 2024, wherein the judgment of the Patna High Court in the case of **Gobinda Construction v. Union of India and Others** was challenged wherein Section 16(4) of the CGST/BGST Act, 2017 was held as constitutionally valid. The matter is listed for hearing 5th Feb 2024.

The Hon'ble Madras High Court in the case of **Tvl. Kavin HP Gas Gramin Vitrak v. The Commissioner of Commercial Taxes & Ors** [W.P.(MD). Nos.7173 and 7174 of 2023 dated November 24, 2023] Based on the scrutiny and verification of GSTR-3B returns filed in the financial year 2017-2018 and 2018-2019, the 2nd respondent issued notice dated 27.04.2022 and directed the petitioner to show cause why there was a belated claim of ITC and also directed to remit back the same as wrong claim of ITC and proposed to reverse the same. Moreover, the petitioner has also claimed financial crisis.

Held: Even though the financial crisis cannot be a ground for not filing the returns in time, not notifying of Form GSTR-2 is clearly a ground to consider the petitioner's claim of belated returns.

Following the judgment rendered by the High Court of Punjab and Haryana in Hans Raj Sons Vs. Union of India and others in CWP No.36396 of 2019, dated 16.12.2019, wherein the Hon'ble Court has allowed the tax payer to file the return either electronically or manually, if the portal is not opening. In the said judgment, the High Court of Punjab and Haryana has relied on another judgment rendered in CWP No.30949 of 2018, in the case of Adfert Technologies Private Limited Vs. Union of India and others, dated 04.11.2019. The same issue was also considered by the Madras High Court in W.P.No.29676 of 2019, dated 06.10.2020.

Technical issue in portal not allowed filing return without paying tax.

Allowed the filing of belated returns for availing ITC in cases where the taxpayer was unable to file GSTR-3B. Further the respondents are directed accept the belated returns and if the returns are otherwise in order and accordance to law, the claim of ITC may be allowed.

Conclusion

There have been numerous decisions mostly upholding 16(4) in past few months with regards to section 16(4). Till final view emerges from Apex Court in this regard, it is expected that the dept would continue to issue notices to deny the ITC availed pertaining to a financial year, post the due date of furnishing 3B returns of Sept of succeeding year/post 30th Nov of succeeding year.

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