

Input tax credit – Burden of proof to substantiate genuineness of Credits

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Claim of bogus input tax credit (ITC) and claim of refund of taxes never paid to the Revenue – The Government has realized that these two are major reasons for huge leakages of revenue. Under the erstwhile indirect tax laws, the Courts have in numerous cases decided in favour of the assessee, whereby certain procedural/documentation lapses such as taking credit on the strength of photocopy of invoice or an invoice which did not mention the name of the recipient assessee or an invoice with improper details, etc., were termed as procedural and credit was not denied to the recipient.

The provisions under GST require the taxpayers to fulfill certain conditions to be eligible for credit. Section 16(2) of the CGST Act, 2017 is relevant in this regard which requires:

- ✓ Possession of tax invoice, debit note or other prescribed document,
- ✓ Receipt of the goods or services,
- ✓ Appearance of the invoices in GSTR2B i.e. requiring the supplier to file details of the invoice in his Form GSTR-1,
- ✓ Payment of tax to the Exchequer, and
- ✓ Filing of Form GSTR3B by the recipient.

Under GST there have been quite a few decisions which have held that the recipient should not be affected by the fact that the supplier has received bogus bills. One such was in the case of **M/s. Balaji Exim**¹ where the petitioner had purchased goods from a supplier, against whom investigation was initiated for receiving fake invoices. The High Court of Delhi in this case held that:

- a. Refund was rejected on a **mere apprehension** that its supplier had issued fake invoices. There is no conclusive finding on the basis of any cogent material that the invoices issued by the supplier to the petitioner / recipient are fake invoices.
- b. There is no allegation that the goods in question were not exported overseas.
- c. It is not correct to reject refund **merely because of suspicion without any cogent material**. There is no dispute that goods have been exported; the invoices in respect of which ITC is claimed were raised by a registered dealer; and, there is no allegation that the petitioner / recipient has not paid the invoices, which include taxes.
- d. Allegations of any fake credit availed by the supplier **cannot be a ground for rejecting the petitioner's / recipient's refund applications** unless it is established that the petitioner **has not received the goods or paid for them**.
- e. If the department is able to find material **to establish** the **allegations regarding non-supply** of any goods by the supplier to the petitioner, they **can initiate action** as may be required under the law.

¹ 2023 ACR 84 & W.P.(C) 10407/2022, W.P. (C) 10423/2022 pronounced on 10.03.2023

Also in the case of **Bhagyanagar Copper Pvt Ltd**² the Telangana High Court held that the provisions of the CGST Act and the IGST Act do not mandate the petitioner to verify the genuineness of the suppliers of its supplier, inasmuch as enough safeguards/mechanism are provided under the Act to recover the taxes, if not paid or wrong credit is availed by the petitioner's supplier or supplier's supplier.

In certain other cases (some listed below) it has been held that the bonafide recipient should not be made to suffer due to supplier's default

- a. New Nalbandh Traders³ – Gujarat High Court
- b. LGW Industries Limited & Ors. Vs. Union of India & Ors⁴ - Calcutta High Court

Thus an important aspect to be noted is that any allegation of fraud must necessarily be proved by the person who levels such an allegation. Where, however, the department succeeds in prima-facie proving its allegation of fraud, the onus would shift to the assessee to prove the genuineness of the transaction, as was held by the High Court in the case of **SMI Electrowire Pvt. Ltd**⁵.

In this case a cheque signed by the taxpayer was found at the premises of a person who was involved in fake invoicing. It was held by the High Court that this by itself cannot be an inference of culpability or wrong doing on part of the taxpayer, more so when statutory stock registers (RG-23) were submitted by the taxpayer.

There are many other cases under the CENVAT regime where it has been held that mere suspicion cannot lead to denial of credit. There has to be sufficient evidence to prove this.

In one recent decision under the KVAT Act, 2003, in the case of **Ecom Gill Coffee Trading Private Limited**⁶ the Supreme Court had held that the burden of proving the correctness of ITC claims lies with the dealer claiming such credit. This burden cannot be shifted onto the Revenue. Mere production of invoices or payment by cheque is not sufficient to discharge the burden of proof cast under section 70 of the said Act.

The Court further stated that a dealer claiming ITC on purchases must prove and establish the actual physical movement of goods, genuineness of transactions, name and address of the selling dealer, details of the vehicle delivering the goods, payment of freight charges, acknowledgement of delivery, etc.

This decision has been rendered in spite of the various favourable decisions in the past under other the erstwhile indirect tax laws which held that bonafide dealers should not be denied the benefit of credit, even where the seller has not deposited the taxes with the Revenue. It is for the Department to recover the taxes from the selling dealer. Some of the cases are:

² 2021-TIOL-2143-HC-TELANGANA-GST

³ Gujarat HC C/SCA/17202/2021 dt. 23.02.2022

⁴ 2021 (12) TMI 834

⁵ 2015 (322) E.L.T. 447 (P & H)

⁶ TS-99-SC-2023-VAT

- a. Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11-SC-VAT
- b. M/s Tarapore and Company Jamshedpur v. State of Jharkhand - 2020-TIOL-93-HC-JHARKHAND-VAT
- c. M/s. Mahalaxmi Cotton Ginning Pressing and Oil Industries, Kolhapur Vs. The State of Maharashtra & ORS 2012-TIOL-370-HC-MUM-VAT

Also in the 28th GST Council meeting held on 04-08-2018 in New Delhi it was stated as follows:

*“18..... There would be no automatic reversal of input tax credit at the recipient's end where tax had not been paid by the supplier. **Revenue administration shall first try to recover the tax from the seller and only in some exceptional circumstances like missing dealer, shell companies, closure of business by the supplier, the input tax credit shall be recovered from the recipient by following the due process of serving of notice and personal hearing.***

Under GST the provision u/s 155 would be relevant to take note of:

*155. Where any person claims that he is eligible for input tax credit under this Act, **the burden of proving such claim shall lie on such person.***

However, an aspect to be remembered is that any person is required to reasonably establish the eligibility of credit. Generally, it is not expected or required that he would have to prove with all possible evidence and beyond doubt that the goods were actually received by him. In the normal course, certain documentary evidence should be sufficient to prove the genuineness of the transaction. These could be documents like transport documents (like LR) to indicate movement of goods, stock and production records to show that goods were purchased, processed and cleared for sale, etc. which can to a reasonable extent prove that the goods were actually received.

Also, in the past there were cases which have held that the recipient has to take reasonable steps to satisfy himself about the existence, identity and address of the supplier/manufacturer. The fact that the suppliers/manufacturers are a Central Excise registered manufacturing unit and no dispute regarding existence and identity of such unit, was considered as a reasonable care taken by the recipient.

Keeping the above in mind, mere reference to the decision of the Supreme Court in the case of **Ecom Grill** *supra* without evaluating the intention and the consistent view taken by the Courts, would be against the very spirit of allowing credit to business. The ideology of allowing credit is to avoid cascading effect and allowing on good faith (self-assessment model), and not on an assumption that all credits would be looked into through the lens of suspicion.

In the view of the paper writers, once the conditions provided under section 16 of the CGST Act are fulfilled and established with reasonable evidence, the onus would be on the Department to provide positive evidence to establish the contrary (to prove fake/bogus credits). It is only when the Department can establish such suspicion with evidence, the assessee would be required to defend their claim of credit with additional records and evidences.

The views expressed are strictly personal and cannot be regarded as an opinion. For any queries or feedback please write to shilpijain@hnaindia.com or vikram@hnaindia.com.