



Reply to 16(4) Notice

Date: _____
To
The Jurisdictional Officer,
_____ **Division,**
_____ **Commissionerate**

Dear Sir,

Sub: Reply to the notice received for reversal of Input Tax Credit

Ref: Your letter dated _____ bearing DIN _____

1. We are in receipt of the above referred letter dated _____ directing us to reverse the input tax credit availed for the month of March 2019 stating that such input tax credit is irregular under Section 16(4) of CGST Act, 2017 as the return for the month of March 2019 is not filed before the due date for filing of return for the month of September of succeeding financial year.
2. At the outset, we would like to submit that the above referred notice directing us to reverse the ITC is not in accordance with law as the ITC availed by us is not irregular. We have received the goods/ services and paid the supplier in full. Hence, we are not required to reverse the same.
3. In this regard, we submit that Section 16 of CGST Act, 2017 provides the eligibility and conditions for taking the input tax credit. Section 16(1) reads as follows
“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.”

From the above referred sub-section, it is clear that entitlement of ITC charged on any supply of goods or services is

- a. Subject to such conditions and restrictions as may be prescribed. The conditions have been given in sub-section (2) of Section 16 and restrictions have been given in Section 17.



- b. In the manner specified in Section 49. Sub-section (2) to Section 49 states that the ITC as self-assessed in the return shall be credited to this electronic credit ledger in accordance with Section 41.
 - c. Such goods or services are used or intended to be used in the course or furtherance of business;
4. Though there is no allegation in the above referred letter regarding the satisfaction of above referred conditions, we would like to submit how we have satisfied the said conditions and why we are rightly eligible for ITC.
5. With respect to conditions specified in sub-section (2) to Section 16, we submit that the said sub-section is beginning with a non-obstante clause to the entire Section 16 which means that the same prevails over all other sub-sections in Section 16. The conditions have been satisfied as follows
 - a. We are in possession of tax invoice/debit note/other documents prescribed under Rule 36 of CGST Rules, 2017;
 - b. We have received the goods or services or both;
 - c. 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. However, we have made payment to our suppliers in respect of which we have availed the input tax credit provisionally under Section 41;
 - d. We have filed the return under Section 39 of CGST Act, 2017. Even though we have filed return belatedly we have paid late fees and by paying late fee, our 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.

With respect to restrictions specified under Section 17, we submit that we have not availed any of the restricted credit.

6. With respect to manner specified in Section 49, we submit that we have self-assessed the input tax credit in the return in accordance with Section 41. Section 41 reads as follows

“41(1) Every registered person shall subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-



assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger”.

However, such conditions and restrictions have not yet been prescribed. Further, section 43A of CGST Act is not yet notified to be effective. There is no dispute regarding availment of input tax credit in the monthly GSTR-3B return. Hence, this condition is also satisfied.

7. With respect to use or intention to use goods and services received in the course of further of business, we submit that all the goods and services received on which ITC has been availed are used in the course or further of business. Therefore, this condition is also satisfied.
8. From the above submissions, it is clear that we have satisfied all the conditions specified under sub-section (1) to Section 16 therefore, we are rightly eligible for ITC availed in the return for the Month of March 2019. Hence, we request you to drop the further proceedings in this regard.
9. However, the above referred letter has stated that we are not entitled for ITC in accordance with sub-section (4) to Section 16 which reads as follows
“(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.”
This sub-section denies the entitlement to take ITC 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 respective financial year whichever is earlier.
10. In this regard, we submit that Section 41 entitles every registered person to take the credit of eligible input tax as self-assessed in his return. However, the registered person is unable to file the return under Section 39 unless they make payment of GST. On perusal of Section 39(1) and 39(7), it is clearly evident that payment of tax is not a pre-condition for filing the return. Further, the due date for filing return and payment of tax are prescribed independently.



11. Contrary to statutory provisions, the common portal is not allowing the tax payers to file the return without making payment of tax thereby the common portal had restricted the taxpayers in filing the return without making payment of tax thereby barred the tax payers in complying with provision of Section 41 which entitles every registered person to claim ITC in the return filed under Section 39.
12. The fact that there is no link between the payment of tax and filing of return and the common portal was not allowing the tax payers to file the returns, is also recognized by Gujarat High Court in case of Octagon Communications Pvt Limited Vs UOI 2019-TIOL-909-HC-AHM-GST (interim order).
13. Further, we would like to bring to your notice that the above fact was also recognised by the GST council in its 31st meeting vide Agenda No. 7(xx) wherein it was stated as follows
“law permits furnishing of a return without payment of full tax as self-assessed as per the said return but the said return would be regarded as an invalid return.”
14. In this regard, we submit that if the common portal would have allowed us to file the returns without making payment of tax which is allowed under the law, we would have filed the returns within the time limits prescribed under Section 16(4) and would have claimed the ITC as per Section 49 read with Section 41. The main reason behind failure in availing the ITC within the time limit prescribed under Section 16(4) is the common portal which had not allowed us to file our return for claiming the ITC.
15. From the above submissions, it is clear that the Central Government had not made available the facility to the tax payers to claim the ITC within the time limit prescribed under Section 16(4). Without making the IT infrastructure available to the taxpayers to comply with Section 16(4) and asking them to comply with such sub-section amounts to asking the tax payers to comply with impossible conditions.
16. We would like to submit that asking the tax payers to comply with Section 16(4) is against the principle of *Lex Non Cogit Ad Impossibilia* i.e, *The law does not compel a man to do that which he cannot possibly perform.* Since the law cannot compel the tax payers to comply with impossible conditions, the proposal to denial of ITC under Section 16(4) is not sustainable.



17. Without prejudice to above, we would like to submit GSTR – 3B cannot be treated as a return under section 39 thereby considering the delay in filing of GSTR-3B to deny the ITC is not correct for the following reasons:

- a. At the time of introduction of GST, it was decided to have three returns in a month i.e. return for outward supplies (GSTR-1), return for inward supplies (GSTR-2) and a combined return in Form GSTR-3 in terms of Section 37, 38 and 39. However, considering technical glitches in the common portal and as well as difficulties faced by the taxpayers it was decided to keep filing of GSTR-2 and GSTR-3 in abeyance.
- b. It would also be apposite to point out that the Notification No.10/2017 Central Tax dated 28th June 2017 which introduced mandatory filing of the return in Form GSTR-3B stated that it is a return in lieu of Form GSTR-3. However, the Government, on realising its mistake that the return in Form GSTR-3B is not intended to be in lieu of Form GSTR-3, rectified its mistake retrospectively vide Notification No.17/2017 Central Tax dated 27th July 2017 and omitted the reference to return in Form GSTR-3B being return in lieu of Form GSTR-3.
- c. Based on aforementioned grounds, the Hon'ble High Court of Gujarat in case of AAP and Co Vs UOI (2019-TIOL-1422-HC-AHM-GST) held that Form GSTR-3B is not a valid return under section 39 of CGST Act, 2017. However, the department has filed an appeal against the above referred decision in Supreme Court vide **Union Of India & Ors Vs Aap And Co in (2019-TIOL-543-SC-GST)** which is pending as on date.
- d. Subsequent to decision of Gujarat High Court, the Central Government had retrospectively amended Rule 61(5) vide Notification No.49/2019 C.T dated 09.10.2019 to treat GSTR-3B as a valid return filed under section 39. With regard to such retrospective amendment, we wish to submit that such amendment cannot be held to be retrospective as it deprives the right entitled to the taxpayer. Retrospective amendment cannot undo a right which has already vested and deny it.
- e. Such retrospective amendment is against the legal maxim - ***Nora constitutio futuris formam imponere debet non praeteritis*** – A new law ought to be construed to interfere as little as possible with vested rights. ***The obvious basis of the principle against retrospectivity was the principle of 'fairness', which must be the basis of every legal rule.*** Hence, such retrospective amendment of rule 61(5) has to be held invalid or illegal.
- f. Even today the Government intends to implement the new simplified return system and not to continue the current GSTR-3B & 1 filing system. Hence, it



can be inferred that the Government still treats GSTR-3B as a temporary return and not a return in lieu under Section 39, in spite of retrospective amendment made in Rule 61(5) vide

18. We would like to submit that the proposal to deny ITC due to procedural lapse is in violation of Article 300A of Constitution of India which states that “No person shall be deprived of his property save by the authority of law”. Input tax credit under GST would be treated as a property of the taxpayer therefore the same cannot be denied to the tax payers due to non-fulfilling the procedural conditions.
19. Further, we submit that proviso to section 16(4) allowed tax payers to avail the credit for the year 17-18 until due date for furnishing the return for the month of March 2019. However for the year 18-19, credit is restricted upto the due date of filing the return for the month of September 2019, which is arbitrary, considering the fact that the issues which persisted in 17-18, continued even in 18-19 also, therefore the relaxation / extension provided for the year 17-18 , should be extended for the year 18-19 also.
20. Without prejudice to above, we submit that nowhere in the GST law it has been prescribed that the entitlement to take credit comes only 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 registered person. Procedure for availment of input tax credit (section 43A) is yet to be prescribed and notified. In our case we had taken our input tax in our books prior to due date mentioned in Section 16(4) and further most of details of such input tax credit are reflecting in our GSTR-2A, hence we are not restricted under the provision of Section 16(4).
21. We would like to submit that most of the details of input tax credit are already available in GSTR-2A which is available with the department prior to due date prescribed under Section 16(4) and the availment of such ITC would be a mere disclosure in GSTR-3B, therefore, the substantial benefit cannot be denied due to procedural lapse of mere non-disclosure in GSTR-3B within the due date.
22. Further, we submit that the Section 16(4) has been challenged before the Hon’ble High Court of Gujarat in case of M/s. Niyati Constructions Vs UOI and stay has been granted on recovery proceedings till next date of hearing. Further, it was also challenged before Hon’ble High Court of Madhya Pradesh in case of M/s. Shreeji



Earth Movers vs UOI (WP No 05434 of 2020). Since the issue is sub-judice before various High Court, we request you not to take any coercive action in this regard.

23. Based on above submissions, we are of the view that the credit availed by us would not get restricted under Section 16(4) of CGST Act, 2017. Therefore, we request your good self to drop further proceedings in this regard.

We shall be glad to provide any other information required in this regard. Kindly acknowledge the receipt of this letter and do the needful.

Yours Sincerely,

For XYZ Limited

Authorised Signatory

(Name : _____)

(Designation : _____)

Copy: Jurisdictional A/C or D/C.

For any further queries/comments please write to laxman@hiregnage.com.

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