

Is there any practical way out to the ITC restriction of 20%- Rule 36(4)

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Nov '19

The much talked and debated amendment in the GST law so far seems to be the new addition to the rule 36 of the CGST Rules, 2017 (referred to as Rules hereafter), as per which the taxpayer's credit availment in respect of the non-compliant suppliers would be restricted to 20% of the value of the eligible credit relating to the invoices uploaded by the suppliers in their Form GSTR-1.

Without getting into the understanding of the calculations required as per the said rule (which has already been analysed in various other articles and forums), in this article we would look at the practical way out. The first question that arises is whether the said rule is valid and can pass through the judicial test of any Court of Law? The answer to this question is a separate article by itself, which is not the objective of the paper writer in this case. This article is trying to address certain concerns of those taxpayers who cannot afford the Writs or who do not wish to get into dispute with the department.

What the rule says

If we look at the rule 36(4), it is brief and does not spell out much details. The said rule dictates the below:

- a. Credit **TO BE availed** in respect of invoices/debit notes which have not been uploaded by the suppliers **u/s 37(1)**
- b. Shall be restricted to 20% of the eligible credit available in respect of invoices/debit notes which have been uploaded by the suppliers u/s 37(1).

The important aspects to be noted above are that:

- a. The provision refers to the credit which is **to be availed** (future tense) and not to a credit that has been availed (past tense). This means that **to be able to avail the credit** the said calculation of 20% has to be done. This brings us to the point which the circular 123/2019-GST dated 11.11.2019 has made in clarifying the issue No. 3, that the calculation of eligible credit as per the said rule is to be done every month. However, the point that such eligibility has to be seen only as on the due date of filing of Form GSTR-1 (as clarified in the said point in circular 123 *ibid*) is not founded in the rule 36(4). Hence it could be said that the 20% calculation though has to be done every month when the credit is availed in Form GSTR 3B, the same can be done by using the GSTR 2A downloaded just before filing the Form GSTR 3B.

- b. In case a particular supplier files his Form GSTR-1 quarterly then whether the non-availability of his invoices in Form GSTR-2A at the time of availing credit by the taxpayer would lead to restriction of credit?

Rule 59 of the Rules provides that **Form GSTR-1** is the statement in which the details of outward supply is required to be **furnished u/s 37(1)** of the Act. Further, for specified class of registered persons, as per notification No. 57/2017 – Central tax dated 15.11.2017, the facility of quarterly filing of Form GSTR 1 is made available. Hence, the data uploaded by the quarterly return filers in their Form GSTR-1 quarterly would be in terms of section 37(1) only, as required under rule 36(4) *ibid*. Hence, it can be said that even though such suppliers upload quarterly, the taxpayer can avail the related credit in its monthly return. However, if the quarterly return filers miss to upload in their Form GSTR-1 by the due date applicable then there could be a non-compliance with rule 36(4). This would create practical difficulty for the taxpayer to track the invoices relating to the quarterly return filers. Further, it is seen that due to the provision in rule 36(4), a number of suppliers are being asked to file their Form GSTR-1 monthly instead of quarterly. The same can be done by clicking “edit” option on the return dashboard at the GST portal by the supplier. This should be done by the suppliers before filing Form GSTR 1 for a particular quarter.

GSTR-2A being a dynamic report

Another question that arises is that the Form GSTR-2A is a dynamic report and it is not possible for a taxpayer to get the said form as it stood at a past date. It gets updated as and when the filings are done by the suppliers. In such a scenario, whether it would **possible/feasible** for the department at a later date to find out and calculate the eligible credit as per rule 36(4)?

As far as the question regarding possibility goes, since the data is being captured electronically in the GST portal, there could be a facility available to generate the required data. However, on a consideration of feasibility, if we take a case where a taxpayer files his return for the month of Oct '19 on 25th Nov '19 then the portal should make available the Form GSTR-2A as on 24th Nov '19 to the officer, who should then identify the excess credit availed on the basis of this statement (as per the steps mentioned below). The amount that would then be recoverable from the taxpayer would only be interest on such excess availment (assuming that the supplier subsequently uploads the invoices in his Form GSTR-1 to the extent

required under rule 36(4)). So, the entire exercise would fetch at the max only interest to the Government which might not be very encouraging to carry out the required process.

Step to be followed

From the above it can be seen that the entire exercise might not be worth the effort for the department. Considering all the points discussed above, the following are the steps which a business can take to ensure reasonable compliance with the said rule:

- a. From the input tax credit taken as per books remove the ineligible credits (i.e. the credits which are blocked u/s 17(5) of the Act and those that are used exclusively for making exempt supplies).
- b. From the above, remove those invoices in respect of which no Form GSTR-1 is required to be filed by the supplier, for example IGST on import of goods, ISD credit, credit of taxes paid under reverse charge, etc. Denote this as **Books Credit**.
- c. Reconcile the invoices of the Books Credit with the entries appearing in Form GSTR-2A to identify the invoices of eligible credit in respect of which the supplier has not uploaded details in his Form GSTR-1. Denote this as **Pending Invoices**. [Suggested to compulsorily identify these invoices and follow up for upload until the condition of rule 36(4) is met]
- d. If feasible, identify the invoices pertaining to quarterly return filers. Denote this as **Quarterly Invoices**.
- e. Calculate **Available Credit** = Books Credit – Pending Invoices + Quarterly Invoices.
- f. If this Available Credit is approximately 84% of the Books Credit then the entire Books Credit can be availed, as it would satisfy the condition of rule 36(4). [As per rule 36(4) taxpayer can avail invoices appearing in Form GSTR-2A (assuming all are eligible credit) + 20%. Thereby, assuming 84% of the credit is appearing in Form GSTR 2A then 20% of this 84% would be approximately 100.8%. Thereby denoting that entire credit as per books can be availed]
- g. Else calculate **Eligible Credit** = Available Credit + 20% of Available Credit.

If it seems cumbersome to follow steps f) and g) above, the taxpayer can avail the entire Books Credit and follow with the suppliers of Pending Invoices to ensure that by the due date of Sep '20 return (i.e. 20th Oct '20 at present) the Form GSTR 2A of the taxpayer contains atleast 84% of the Books Credit. Thereby, the credit availed during the year without following steps f) and g) above would attract only interest liability (@ 18% p.a.) at the most (assuming that the credit is utilized).



The above is suggested considering the fact that the cost of compliance would be much more than the cost of non-compliance.

Thereby, the important point to drive home (or to work!!) is that the businesses should start identifying suppliers not uploading invoices in their Form GSTR-1 and follow-up for compliance, which will also ensure that the availing of credit when the new return forms are in place (which is expected to be in place from 1st Apr '20, at which time the provision under section 43A would give legal validity to the provision contained in rule 36(4)), would be much easier. For further details regarding the new return forms refer link -> <https://hiregange.com/assets/articles/bf860-handbook-on-new-and-simplified-returns-final-for-printing-190819-final.pdf>, which provides a detailed booklet.

For any further queries/comments please write to shilpijain@hiregange.com.

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