



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

(Set up by an Act of Parliament)

ICAI/IDTC/2018-19/Rep/2

1st March, 2018

Shri Arun Jaitley

Hon'ble Union Minister of Finance, and
Chairman, Goods and Services Tax Council
Ministry of Finance,
Government of India,
North Block,
New Delhi-110011

Respected Sir,

Sub: Clarification that the input tax credit should not be denied to buyer for mistake of seller

1. The proactive response to the challenges of SMEs and IT glitches for encouraging compliance in GST are acknowledged by all stakeholders. We at ICAI would like to take this opportunity to thank the Government for involving us to make GST simple, fair and transparent.
2. We understand that further simplification process of uploading of invoices by supplier and its acceptance by the receiver as suggested by Shri Nandan Nilkeni is being discussed.
3. One concern which may already be/ being considered which was raised by us in the initial suggestions could limit the gains.

Possible Situation & Our Concern:

4. The taxable goods/services are being supplied by the supplier under cover of tax invoice which contains tax. The supplier collects the invoice value including the tax portion from the buyer. Later the supplier may not pay the tax collected to Govt or may fail to file the returns. Assessee who is the buyer goes on to claim credit based on the tax invoice of the supplier based on bona fide belief that the taxes have been remitted by seller to Govt treasury.





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5. In this backdrop, it is important here to note the relevant provisions made for ITC under the Central Goods and Services Tax Act, 2017 (“the CGST Act”) which states that every registered person shall be entitled to take credit of input tax charged on the 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.
6. The credit will not be allowed unless the tax charged in respect of supply has been paid to the Government, either in cash or through utilisation of ITC.
7. The benefit of input tax credit is denied to a bona fide purchaser, because of the default of the selling dealer over whom such purchasing dealer has no control.
8. It is the concern of trade and professional that the eligible ITC should not be denied to the bona fide purchasing dealer merely for the fault of selling dealer considering that the law should be fair. It should not be made the responsibility of the purchasing dealer to ensure that the tax is deposited by the selling dealer when the transaction is bona fide.
9. While understanding that the reason for the provision was the bogus bills (bills raised on buyer and once cash received being cancelled - tax not paid or supplies to A but invoice raised on B). Such practice by errant assesseees was prevalent in limited extent in Central Excise / Service tax and larger extent in VAT in all States.
10. Law should not be made for the errant as it harms the honest assessee. The adverse impact of making the buyer responsible could lead to the following impact:
 - i. The large number of registered assesseees would fail to join the mainstream and omit to raise invoices for supplies and fail to file returns.
 - ii. The SMEs may not have the wherewithal to verify and acknowledge each invoice of the supplier as non-compliance with the payment or filing of return by the supplier would lead to denial of credit with interest. Substantial time and effort would be spent on follow up with the unorganised sector.
 - iii. Trade may opt to pay the basic price and not pay the GST till the supplier’s compliance is clear. This would create delays in realisation of the tax which could be much higher than the margin- leading to severe cash flow issues for the supplier. This would also impact the avowed intention of GOI to make ease of doing business in India a reality.



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- iv. Further this type of measure could be challenged as not being fair and violative of Article 14 of the Constitution.
 - v. Such credit denial is also against Article 19(1)(g) of Constitution of India which sets out- All citizens shall have the right (g) to practise any profession, or to carry on any occupation, trade or business. It is possible that the unorganised (not dishonest) smaller trade/ industry would not get orders from the organised industry which has 1000s or 10,000s of invoices every month.
 - vi. Revenue would still proceed against the defaulting assessee and recover the tax along with interest and penalties. In earlier regime, the invoices were not being uploaded. Here the liability of the errant supplier would be evident to the revenue within a short period and using software notices for compliance could be sent immediately. This was not possible in the earlier regime unless an audit was taking place.
 - vii. The revenue for the GOI comes substantially from the compliant is a fact which should not be lost sight of.
11. Similarly, provisions/ disputes in Central Excise, Service Tax and VAT have been held to be unreasonable in the past in the following decisions:
- a. Recently, the Hon'ble Supreme Court in the case of Commissioner of Trade & Taxes, Delhi and others Vs. Arise India Limited and others [TS-2-SC-2018-VAT], has dismissed the Special Leave Petition filed by the Revenue against the decision of the Hon'ble High Court of Delhi in the case of Arise India Limited and others Vs. Commissioner of Trade & Taxes, Delhi and others [TS-314-HC-2017(Del)-VAT] ("**Arise India case**"). The Hon'ble High Court of Delhi held Section 9(2)(g) of Delhi VAT Act to the extent it disallows Input tax credit ("**ITC**") to purchaser due to default of selling dealer in depositing tax, as violative of Articles 14 and 19(1)(g) of the Constitution of India.
 - b. Kay Kay Industries (2013-TIOL-41-SC-CX). (2013-TIOL-41-SC-CX) that the manufacturer cannot determine whether his supplier has discharged excise duty on the goods which are supplied to the manufacturer by him.



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- c. In *Larsen & Toubro vs. CCE* (2001 (127) ELT (807)), it was held that the assessee should not be penalized [by denying credit] for the mistake of seller of goods. [copy attached]

In this backdrop, we urge that it maybe specifically provided that the input tax credit would not be denied to the purchasing dealer for non-payment by selling dealer, if the purchasing dealer acted in bona fide manner.

Alternative Workable Methodology:

More specifically law may set out the following:

- **Uploading of invoice data whether by Supplier or by Recipient comprising invoice number, GSTIN (both parties) and tax amount without elaborate item-wise listing**
- **Bifurcation may be limited to export, exempted and taxable for availment of credit by the recipient. [reversal would be automatic based on proportion.]**
- **Prior period adjustments to be uploaded also.**
- **Interest would anyway apply on belated filing. Bar on filing returns perpetuates non-compliance**
- **Immediate automatic notice to supplier on default of payment.**
- **Recovery proceedings initiated based on Recipient 'push' data. Simultaneous notice to buyer on default of supplier [to hold back payments]**

This alternative would:

- I. Safeguard the interest of revenue (at most 1 month revenue from such defaulting assessee against whom action within 3 months can be initiated) Only those who disappear would be loss of revenue- expected to be less than **0.1%. Small cost.**
- II. Provide relief from unnecessary compliance of follow up by trade
- III. Objective of avoiding cascading impact of duties met.
- IV. Revenue officers would not have to follow up physically (as notice will be automatic) other than these limited cases of willful non-payment/disappearance.
- V. Possible challenge and dispute avoided. Objective of ease of doing business met.
- VI. Law becomes simple and fair.



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Looking forward to your consideration on this vital aspect. For any clarification please contact idthc@icai.in. or Secretary, Indirect Taxes Committee of ICAI, Tel No. 0120-3045954, Mob No. 9310542608.

Thanking you.

Yours Truly,

CA. Madhukar N. Hiregange
Chairman
Indirect Taxes Committee

Enclosure: Copy of Larsen & Toubro vs. CCE (2001 (127) ELT (807) case

Copy to:

1. **Dr. Hasmukh Adhia**, Finance Secretary (R), Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi - 110001.
2. **Smt. Vanaja N Sarna**, Chairperson, CBIDT&C, Department of Revenue, Government of India, North Block, New Delhi - 110001
3. **Sh. Mahender Singh**, Member (GST), CBIDT&C, Department of Revenue, Government of India, North Block, New Delhi - 110001
4. **Smt. Ameeta Suri**, Member (Excise), CBIDT&C; Department of Revenue, Government of India, North Block, New Delhi - 110001
5. **Sh. John Joseph**, Member (Budget), CBIDT&C, Department of Revenue, Government of India, North Block, New Delhi - 110001
6. **Shri Upender Gupta**, Commissioner, Goods and Services Tax Policy Wing, CBIDT&C, Department of Revenue, Government of India, North Block, New Delhi - 110 001
7. **Sh. Arun Goyal**, Additional Secretary, Office of the Goods and Services Tax Council, Tower -II, 5th Floor, Jeevan Bharti Building, New Delhi - 110001.

2001 (127) E.L.T. 807 (Tri. - Mum.)

IN THE CEGAT, WEST ZONAL BENCH, MUMBAI
Shri G.N. Srinivasan, Member (J)

LARSEN AND TOUBRO LTD.
Versus
COMMISSIONER OF CUS. & C. EX., NAGPUR

Order Nos. 2882-83/2000-WZB/C-II, dated 13-10-2000 in E/Stay/905/2000-Mum. in Appeal No. E/1243/2000-Mum.

Modvat not to be denied for the mistake of seller of goods namely Indian Oil Corporation Ltd. - Modvat credit to be granted to assessee - Rule 57Q of Central Excise Rules, 1944. [para 7]

REPRESENTED BY : Shri Prakash Shah, Advocate, for the Appellant.
Shri A. Chopra, DR, for the Respondents.

[Order]. - Today only an application for stay has come. When I looked into the matter I thought that appeal and itself be disposed of after waiving pre-deposit and with consent of the sides.

2. The appellants are a company engaged, *inter alia*, in the manufacture of portland cement falling under Chapter 25 of the Central Excise Tariff Act, 1985, they have factory at Chandrapur, Maharashtra. They availed Modvat credit on capital goods in terms of Rule 57Q of the Central Excise Rules. According to the Department they have availed wrongly Modvat credit to the Tune of Rs. 1,56,176/- in respect of certain goods purchased from the Indian Oil Corporation Ltd. Four show cause notices were given and such show cause notices were disposed of by Orders-in-Original Nos. 68/99 to 71/99 (Demand) dated 22-3-1999 by the adjudicating authority. The authority in two paragraph have held as followed :

“From the above it may be concluded that the Noticee No. 1 should not be denied of availment of Modvat credit on the invoices issued by the IOCL if the matter is viewed judiciously in perspectives of the facts and circumstance discussed in foregoing paras. This view may be clarified with a simple analogy that ‘A’ should not be punished for the wrong act committed by ‘B’ unless it is proved that ‘A’ is an accomplice with ‘B’ in the act committed by ‘B’.

In the entirety of the above findings I hold that the Noticee No. 1 are not denied Modvat credit as far as the issue discussed herein above if otherwise the eligibility criteria of the goods in question are fulfilled under Rule 57A or 57Q as the case may be”.

3. After having held as above Assistant Commissioner in the order portion has held further as follows :

“As regards the rest amount of Modvat credit of Rs. 1,56,176/- disallowed on merit to Noticee No. 1. I hereby order that the same should also be paid by the Noticee No. 2 in case of it is disputed by the Noticee No. 1”.

4. Against that order an appeal was filed before the Commissioner (Appeals) Bhopal, who by his order dated 9-12-1999 dismissed the application of the assessee filed under Section 35F without calling any hearing and without discussing the merits of the case. By the impugned order dated 25-1-2000 Commissioner (Appeals) dismissed filed before him. Hence the present appeal.

5. Shri Prakash Shah the Id. Advocate appeared for the assessee and Shri A. Chopra Id. DR appeared for the department.

6. Shri Prakash Shah had argued that for the mistakes committed by the sellers of the assessee, punishment should not be meted out to the assessee. Shri Prakash Shah states that having held at page 59 of the paper book that mistakes is not on the part of the assessee, the Assistant Commissioner ought not to have fastened the liability on the assessee in an alternative way. He states that all orders of assessment should be specific. DR adopts the reasoning of the lower authorities.

7. I have considered the arguments, I agree with the contentions raised by Shri Prakash Shah. Having held that the assessee is not to be blame for the mistake of the sellers of the goods namely Indian Oil Corporation Ltd., he should not have passed the orders as mentioned above even in an alternative way I therefore set aside the impugned order which does not discuss these aspects and order grant of the Modvat credit to the assessee setting aside the impugned order. Appeal is allowed ordering consequential relief to the assessee. In view thereof Stay petition filed in this appeal stands disposed of.
