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NEWS & VIEWS

From President's Desk...



Dear Professional Colleagues and Readers,

Let me first my dear professional colleagues a prosperous new year. I am sure everyone would have enjoyed the Diwali festival amidst busy return filing due dates. I sometimes get amused by the way we celebrate Diwali.

We start our celebration by cleaning, renovating, and decorating our homes and workplace. We have Diyas and rangolis, we wear our finest of clothes, illuminate the interior and exterior with colorful lights, have Lakshmi Puja, light fireworks, distribute gifts, mithai and dry fruits. Diwali has its own importance amongst Jains and Sikhs. We, Jains consider Diwali as the liberation of lord Mahavira, similarly, Sikhs celebrate Diwali as the release of Guru Har Gobind from a Mughal prison and Buddhist celebrates Diwali by worshipping Lakshmi. Hindus celebrates Diwali as the return of Lord Ram, Sita and Lakshman to Ayodhya. Every year Ayodhya as a mark of celebration recreates a similar scene by lighting up a number of Diyas. This year, they created a record by lighting up more than 17 lacs of Diyas, presenting a mesmerizing view of the reflection of the Diyas in the Saryu River with a breath-taking view.

This month we also had news from the United Kingdom, where Mr. Rishi Sunak has scripted history by becoming Britain's first Indian-origin Prime Minister. He took oath as MP from Yorkshire, on the Bhagavad Gita in the Parliament. He was once quoted saying that the Bhagavad Gita often rescues him during stressful situations and reminds him to be dutiful.

India had their first encounter against arch-rival Pakistan in the T20 world cup, and undoubtedly, the win in the game will go as one of the finest victories in Indian Cricket history.

Further, I would like to take this as an opportunity to announce our upcoming events:

We plan to organize a couple of public awareness programs. As a mission to take financial literacy awareness to each section of society, our next program will be at Dombiwali where our own member CA Rajesh Gada will enlighten the public on the importance of Term Insurance Policy. We then have a public program on impact of a Weak Indian Rupee against USD on the Indian Equity market. I would request everyone to take benefit of the same.

We are also planning to have a student's Non-Residential-Refresher-Course in the month of December. Such programs are important for a strong foundation and networking at an early age.

Events in retrospect:

This month we organized a public program on "Does and Don't of Immovable Property" at Yogi Sabhagrah. We had one hour of a special session of QNA from the public to clarify their doubts, and guest speaker Adv. Dhiren Nandu answered everyone's questions with crisp clarity.

With this, I would once again like to wish Happy new year.

Regards

Thank you all..... Always in Gratitude


CA Amit Chheda

November 1, 2022



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INFLATION – THE ECONOMIC DEMON



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FROM THE DESK OF CHAIRMAN

At the outset, let me wish you all a very happy and prosperous new Vikram Samvat Year 2079. I am sure, after a gap of two years, this Diwali festival was economically and emotionally rewarding.

In the aftermath of COVID 19 pandemic, economic and other effects of which are still lingering on, and further ongoing and stretched war between Russia and Ukraine, are having its toll on economies of the countries individually and of the world collectively. Of course the reasons of high inflation in each country vary, global high inflation trends emanate from common causes.

One major impact of the war has is increase in the crude oil prices, which in effect resulted in the inflation world over. Though the crude oil prices recently have come down, the same are in higher bracket if we consider last 5 year scenario. Apart from war various other factors impacted high inflation rate world over (e.g. USA printed more currency during COVID times to provide monetary support to its citizens, and so on). Most of the European countries, including UK, are facing double digit inflation rate. The biggest economy i.e. USA is facing inflation rate of more than 8%. High inflationary trends are also seen in most countries of Asia and Africa. In short world is reeling under inflationary pressure.

To put the facts in perspective, consider this data:

- (1) Belgium's annual inflation rate accelerated for the third straight month to 12.27% in October 2022, from 11.27% percent in September. It was the highest reading since June of 1975, mainly due to soaring prices of housing & utilities (33.91% vs. 31.51% in September), amid skyrocketing energy costs. Prices also continued to climb for food & non-alcoholic beverages (12.92% vs. 10.75%) and transportation (10.69% vs. 10.58%). On a monthly basis, consumer prices inched up by 2.37%.
- (2) The annual inflation rate in Portugal is likely to increase to 10.2 percent in October of 2022, the highest since May 1992, compared to 9.3 percent in September, preliminary estimates showed. Energy prices surged 27.6 percent, driven by gas prices, while food costs jumped 18.9 percent, the most since June 1990. Consumer prices were up 1.3 percent compared to the previous month, following a 1.2 percent gain in September.
- (3) The annual inflation rate in Italy rose to 11.9 percent in October of 2022, the highest in over 38 years, picking up from 8.9 percent in the previous month and soaring past expectations of 9.6 percent, according to preliminary estimates. The acceleration in consumer prices was mainly attributed to higher prices of energy (73.2 percent vs. 44.5 percent in September), due to the large premium that Italy pays to source energy from sources other than Russia.

- (4) Annual inflation rate in France accelerated for the first time in three months to 6.2% in October of 2022, the highest since June of 1985, from 5.6% in September. Figures came higher than market expectations of 5.7%, preliminary estimates showed. Prices of energy (19.2% vs. 17.9%), food (11.8% vs. 9.9%) and manufactured products (4.2% vs. 3.6%) accelerated
- (5) Germany's consumer price inflation rose further to 10.4 percent year-on-year in October 2022, a new all-time high and above market expectations of 10.1 percent, lifted by euro weakness, a deepening energy crisis and the continuing supply chain interruptions.
- (6) USA's inflation rate is highest in last 25 years and way above its normal range of 2-4%.
- (7) The annual inflation rate in Japan was at 3.0% in September 2022, unchanged from August's near 8-year high figure, amid high prices of food and raw materials as well as yen weakness. Main upward pressure came from cost of food (4.2% vs. 4.7% in August); fuel, light and water charges (14.9% vs. 15.6%), mainly electricity (21.5% vs. 21.5%) and gas (19.4% vs. 20.1%).

It can be seen that the inflation rates are very high and paint a gloomy picture. Many smaller countries are facing economic turmoil due to very high inflation rates and in turn are facing social, political unrest.

These high inflationary pressures can result in compelling central banks to hike interest rates aggressively, which can in turn result in further higher inflation and slowing of economy leading to various other issues like reduction of purchasing power, increase in unemployment (though in short term unemployment may get reduced), high cost of finance, higher property rates, rise in inequality etc. and may ultimately cause painful recession. Only strong and willing governments will be able to provide sustainable economic solutions to this problem. We have already witnessed social and economic unrest followed by economic turmoil, mainly caused by hyper inflation in many countries recently, such as Sri Lanka, Venezuela, etc. Even UK faced political upsets due to its economic woes and saw three prime ministers in less than two months. Main factors which have been impacted are decline in per capita income (mainly in emerging market economies), increase in commodity prices alongside rising global demand, increase in food prices, and so on.

We are aware that reasonable inflation is sign of economic development and growth, however, high inflation can eat into itself and make lives of people very painful. No country can be indifferent to economic woes in other part of the world. However, sensible economic decisions by stable governments, sound monetary policies by central bank scan only make this journey through economic cycle lesser painful and help people sustain their businesses, etc. Good news is that it is believed that the global inflation may have peaked and forecast suggests that in next couple of years inflation will ease considerably. Let us hope that lowering of inflation in future is not result of recession.

Let us pray that New Year brings better economic conditions and economic demons are dealt with strongly and sensibly by the Governments world over.

Thank you all..... Always in Gratitude

CA Ketan Rambhia



GST DEPARTMENT AUDIT - FAQs



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As all my professional colleagues are aware, GST certification in Form GSTR 9C by a Chartered Accountant was scrapped from FY 2020-21 onwards. Thus, it seems that the GST Authorities shall rely on tons of data and information generated through GSTR 1, GSTR 2B, E-way bills, E-Invoice etc. while assessing a taxpayer.

Further, under Section 65 of CGST Act 2017, departmental authorities can carry out GST Audit of a taxpayer.

As Section 65 of the said Act, departmental authorities can conduct the audit by visiting the place of business of a taxpayer. The authorities can visit the premises only after informing at least 15 days before the visit in Form GST ADT-01. The audit has to be completed within three months of commencement of audit

The expression "commencement of audit" shall mean the date on which the records and other documents, called for by the tax authorities, are made available by the registered person or the actual institution of audit at the place of business, whichever is later.

It is mandatory to provide the authorities books of accounts and other documents and information in a time bound manner.

If on conclusion of such audit results in detection of tax not paid or short paid or erroneously refunded, or input tax credit wrongly availed or utilised, the proper officer may issue Show Cause Notice under section 73 or section 74 of CGST Act.

In view of the above background, let us understand GST department Audit under CGST Act in the form of Q&A

Q. Whether concept of Audit carried out by departmental authorities by visiting place of business new?

A. No. This is not a new concept. Similar concept was already in existence under Excise and Service Tax laws in erstwhile Indirect tax regime

Q. Do the departmental authorities visit the premises to conduct said audit?

A. Yes, the authorities visit the premises to conduct said audit

Q. Since departmental authorities visit the premises, can they seize any books of accounts or other such information?

A. The department does not have the authority to search and seize any books of accounts or information during this process of GST Audit.

Q. What is period of Audit?

A. As per Rule 101 of CGST Rules, the period of audit to be conducted shall be a financial year or multiples thereof.

Q. What is the scope of Audit?

A. The authorities who conduct audit of the records and the books of account of the registered person shall, with the assistance of the team of officers and accompanying officials shall verify:

- the documents on the basis of which the books of account are maintained
- the returns and statements furnished
- the correctness of the turnover, exemptions and deductions claimed,
- the rate of tax applied in respect of the supply of goods or services or both,
- the input tax credit availed and utilised,
- refund claimed,
- other relevant issues

Q. What is the duty of the taxpayer undergoing said audit?

A. Following are some of the duties of a taxpayer undergoing audit:

- [i] To Comply in time to GST-ADT-01 notice and all necessary correspondence from audit officer with respect to the audit proceeding,
- [ii] To make available all necessary books of accounts i.e. physical record as well as accounting system access/electronic record as per necessity to audit team and any other document/ information required to complete the audit
- [iii] To provide the necessary facility to verify the books of account/other documents as required,
- [iv] To ensure presence of either the Registered Person or his authorised representative at the place of business where audit is being conducted during audit activity so that he can explain the books and the business activity properly
- [v] To extend necessary cooperation to the audit team during Place of Business audit visit for timely completion of audit,
- [vi] To follow the statutory timelines in case of making payment if audit results are accepted and / or to comply with notice under section 73 /74 of GST Act in case audit finding are not accepted.

Q. Whether taxpayer shall have an opportunity to explain any discrepancies, if any, noticed during the time of audit?

A. The authorities inform the taxpayer of the preliminary discrepancies noticed, if any, as observed in the audit and the said person may file his reply. The authorities finalise the findings of the audit after due consideration of the reply furnished by the taxpayer.

Q. Whether final audit findings are informed to the taxpayer?

A. Yes, final audit findings are informed to the taxpayer in Form GST ADT-02

Q. Are there any parameters set by the department to identify taxpayers for selection of audit?

A. We understand that the selection of audit is random in nature. Any taxpayer can face such audit by the department. However, some of the Risk parameters which are considered while selecting a taxpayer for audit are:

- [i] Volume of the Taxpayer's turnover/net profit,
- [ii] Variation in the Taxpayer's turnover/net profit as compared to previous years,
- [iii] Huge Exemptions claimed by the taxpayer,
- [iv] Higher incidence of supplies without issuance of E-Way Bills,
- [v] Taxpayer who does not file periodical return but issues E-Way Bills
- [vi] Financial ratio analysis and if any major variations observations,
- [vii] Volume of Tax Refund claimed by the taxpayer's year wise comparison and if any variations observations,
- [viii] Multitude of the taxpayer's legal relationships with other entities,[ix] Taxpayer has multiple branches,
- [x] Taxpayer who has requested waiver or is bankrupt,
- [xi] Taxpayer categorized as High Risk,
- [xii] Taxpayer's return was previously investigated for evasion,
- [xiii] Taxpayer who has not been audited in the pre-GST era for a long period i.e. 4 to 5 years under VAT or Service Tax,
- [xiv] Any specific information received from other Government authorities i.e. Income Tax, ROC, RBI, Local tax authorities or any written compliant received from the person.
- [xv] Difference in the turnover as declared in Form GSTR-1 and GSTR-3B returns for multiple period,
- [xvi] Difference in ITC availed and utilized as per GSTR-3B and ITC available as per GSTR-2A,
- [xvii] Wrong classification of goods or services provide, effecting wrong levy of tax,
- [xviii] Mismatch in the details of Export reported under GSTR-1 and information lodged on ICEGATE
- [xix] and inconsistency in the data declared in GSTR-1 and E-way Bills generated

Q. What are the consequences if the notice in Form GST ADT-01 has not been replied in time bound manner?

A. It is suggested to reply to said notice within timelines mentioned in said notice. If no reply / information / documents are furnished, then, it may lead to prosecution

Q. Generally, the timelines mentioned in the notices are too short. What to do in such scenario?

A. It is suggested to furnish information which is readily available in reply to that letter. For balance information, additional time can be sought to furnish balance information

Q. If an audit is carried out under Section 65 by a State Authority for a particular financial year, then said audit can be carried out by Central Authority for same financial year?

A. No. Dual jurisdiction for same matter is not allowed under GST Act and Rules.

Q. What are the information/ documents/ books of accounts verified by the authorities during the course of the audit?

A. Following is the illustrative list of information that can be sought by departmental authorities

- [i] All such Books of accounts mentioned as per Section 35 of the CGST Act read with Rule 56
- [ii] Tax Invoices, Bill of Supply, Delivery Challans, Credit Notes, Debit Notes, receipt Vouchers, payment vouchers and refund etc., like the details in the invoices should be subject to specific rules,
- [iii] If the taxpayer is having multiple branches, stock transfers amongst branches must also be reconciled. Stock Register reflecting opening balance, receipts, supply and goods lost, stole Destroyed and the closing stock,
- [iv] If the taxpayer is a manufacturer, production records including break up of raw Materials, finished goods, scrap etc,
- [v] Details of Advances received and paid during the audit period,
- [vi] Records pertaining to Input Tax Credit availed and utilized. Input Tax Credit should be reversed for non-payment within 180 days and this should be checked by the auditor,
- [vii] If the taxpayer has maintained electronic records, log of all the entries modified or Deleted etc
- [viii] Reconciliation of all the information with GST returns
- [ix] Details of E-Way Bills register as per GSTN data,
- [x] Copies of GST Returns like GSTR-1, GSTR-2A, GSTR-2B, GSTR-3B, GSTR 9/9C etc. along with copies of tax payment challan etc., for the audit periods.
- [xi] Audited financial Statements including Audit Report etc., for the audit period,
- [xii] Copy of Income Tax Return for the audit periods,
- [xiii] Copy of Form 26AS provided by I.T. Department for the audit period.
- [xiv] Copies of Inward and Outward Ledgers,
- [xv] Copy of the GST registration certificates of Principal Place of Business and branch and other place of details whether incorporate or not

Note: The above views of the author are personal and are based on the laws prevailing as on the date of article.



DECODING THE CHANGES IN THE CONDITIONS FOR CLAIMING INPUT TAX CREDIT (EFFECTIVE FROM 1ST OCT 2022)



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Input Tax Credit means claiming the credit of the GST paid on purchase of Goods and Services which are used for the furtherance of business. The Mechanism of Input Tax Credit is the backbone of GST and is one of the most important reasons for the introduction of GST.

As GST is a single tax levied across India (right from manufacture of goods till it reaches the end customer), the chain does not get broken and everybody is able to take benefit of the same and there is seamless flow of credit. Uninterrupted and seamless chain of input tax credit (herein after referred to as, "ITC") is one of the key features of Goods and Services Tax.

Let us now analyse Section 16 of the Central Goods and Services Tax Act, 2017 which deals with eligibility and conditions for claiming of ITC. Section 16(2) provides for conditions which need to be complied with while claiming ITC.

Extract of Section 16(2) is as follows-

- (2) Not with standing anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,--
- (a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;
- [(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;] *Inserted by The Finance Act, 2021 (No.13 of 2021)- Brought into force w.e.f. 01st January, 2022*
- (b) he has received the goods or services or both.
- (c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and
- (d) he has furnished there turn under section 39:

Clause (be) inserted in section 16(2) to provide additional condition for claiming ITC by a buyer - ITC with respect to an invoice can be availed by buyer only if such ITC has not been restricted in the details communicated to buyer in the form of auto generated statement (i.e., GSTR-2B) u/s 38 of CGST Act. [Brought into force w.e.f. 01st October, 2022]

Now let us understand Section 38.

Before 01.10.2022, Section 38 of the CGST Act dealt with furnishing of details of Inward supply and prescribed for filing of GSTR2 containing detail of inward supplies on which the tax payer is claiming ITC. However, this mechanism could never be implemented since the implementation of GST law.

Now by virtue of this amendment, entire Section 38 is substituted w.e.f 1.10.2022 with a new section which provides for 'Communication of details of inward supplies and Input Tax credit'. The name itself makes it clear that the earlier mechanism of filing of GSTR2 is now scrapped.

Section 38 has been substituted to provide that now, the auto generated statement of ITC (i.e.,GSTR-2B) shall consist of two below major components.

(a) Details of ITC which may be availed; and

(b) Details of ITC which cannot be availed in respect of invoices furnished u/s37(1)

Now let us analyse the condition when ITC cannot be availed as mentioned in Section 38-

- Supplies made by a supplier who has obtained new GST registration upto such period as may be prescribed.
- Supplies by a registered person who has defaulted in payment of GST for a specified period of time. This entry covers those suppliers who have filed their GSTR-1 by the specified due date but failed to file GSTR-3B.
- Supplies by a registered person whose output tax payable as per GSTR-1 exceeds the output tax paid by him in GSTR-3B by such limit as may be prescribed
- Supplies by suppliers who have availed ITC in GSTR-3B in excess of eligible ITC.
- The supplier has defaulted in discharging his tax liability as per Section 49(12). As per newly inserted Section 49(12) of the CGST Act, the Government may specify the such maximum proportion of output tax liability that may be discharged through the electronic credit ledger by a registered person or a class of registered persons. Therefore, liability in excess of the specified limit is required to be paid in cash.
- Such other class of persons as may be prescribed.

The Main intention behind this amendment is to break the fraudulent ITC chain of dealers causing great loss to the nation. However, this amendment is going to bring lot of difficulties to genuine buyers also where their supplier does not discharge his GST liability properly.

In a number of judgments, it has been held that recipient cannot be held responsible for the default of supplier in paying his taxes, if the transaction is a genuine one. So, the proposed amendment shall cover these cases also and shall have adverse effect on genuine buyers/recipients.

Extension of time limit for availing ITC

Section 16(4) amended to provide time limit for availing ITC in respect of invoices or debit note pertaining to a Financial Year upto 30th November of the following financial year.

Earlier the time limit was due date of September month i.e., 20th October / 22nd October / 24th October as the case may be.

Department vide Press Release dated 4th October 2022 have clarified that the above extension of time limit shall apply to ITC to be claimed for FY 2021-22 as well. In other words, ITC of FY 21-22 can be claimed in the returns filed upto 30th November 2022.

Restriction in maximum utilization of ITC

There has been Rule 86B inserted in CGST rules for a while. This rule was inserted and made effective from 01.01.2021. As per this rule a tax payer shall not utilize ITC towards payment of its Output tax liability in excess of 99% of the output tax liability. This restriction was subject to certain exemptions. There was a dispute over the validity of this provision since implementation, as there was no section in the CGST Act which allowed such restriction.

Now an amendment has been made to sub section (12) to Section 49 of the CGST Act. The newly inserted sub section (12) provides that the Government shall specify the maximum proportion of output tax liability which may be discharged through utilization of ITC.

Government has time and again been making changes in various provisions for claiming ITC. The intention is to stop the fraudulent dealers from taking benefits under GST, however some of these restrictions/amendments would affect genuine dealers as well.



GST INPUT TAX CREDIT – ISSUES IN SEC. 17(5)(H)



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The GST Law – India's biggest indirect tax reform completed 5 years in this year.

During its infant and toddler stage, the GST Law has given sleepless nights to the taxpayers. As the law ages, the taxpayers should expect to see some unanticipated mischiefs and tantrums of this notorious kid.

With the commencement of GST audits/assessments, taxpayers are witnessing tax demands on many unaddressed/open issues- Input Tax Credit ('ITC') being one.

One of the fundamental principles at the heart of the Goods and Services Tax Law is to allow seamless flow of ITC- to address the long outcry of the taxpayers during the erstwhile regime. Ironically, time and again, taxpayers are witnessing instances where their claim of ITC is being challenged by the tax authorities.

Reversal of ITC u/s. 17(5)(h) of the Central Goods and Services Tax Act, 2017 ('Act') on the goods lost, stolen, etc. requires some pondering. Let us try and analyse the said provision in detail.

History

The erstwhile Central Excise law also have the concept of input tax credit i.e. CENVAT. The law provided for the duty remission and credit reversal in similar cases of goods lost, stolen, destroyed, etc.

Rule 21 of the Central Excise Rules, 2002 provided for remission (i.e. waiver) of payment of excise duty if the manufactured goods have been lost or destroyed by natural causes or by unavoidable accident or are claimed by the manufacturer as unfit for consumption or for marketing, at any time before removal. Consequently, Rule 3(5C) of the Cenvat Credit Rules, 2004 provided for reversal of CENVAT credit on inputs used in the manufacture of the said goods and on input services used in or in relation to the manufacture of the said goods.

Also, Rule 3(5B) of the Cenvat Credit Rules, 2004 provided for reversal of CENVAT Credit on full/partial write-off or provision for write-off of inputs or capital goods.

Similar provisions also existed in some of the state VAT laws.

Thus, reversal of ITC on the grounds specified in Section 17(5)(h) existed under the erstwhile laws as well – which also saw litigation.

Issue 1: Scope and Coverage of reversal

Section 17(5)(h) states that ITC shall not be available 'in respect of' -'goods' – (A) lost, (B) stolen, (C) destroyed, (D) written off or (E) disposed of by way of gift or free samples.

Goods has been defined in Section 2(52) of the Act to mean '*every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply*'.

Whereas input has been defined as '*goods other than capital goods*'.

It is pertinent to note that the term used in Section 17(5)(h) is goods and not inputs. Goods covers raw materials, packing materials, consumables, stock-in-trade, etc. (current assets as per books) as well as plant and machinery, furniture, etc. (i.e. fixed assets as per books). Thus, scope of Section 17(5)(h) is wide enough to cover all goods in GST i.e. inputs as well as capital goods.

Secondly, it is imperative to understand the meaning of the phrase 'in respect of'. The said phrase has not been defined under the GST law. However, the Hon'ble Apex Court analysed the said phrase in the case of *State of Madras v. Swastik Tobacco Factory* [AIR 1966 SC 1000]. The Hon'ble Apex Court held that *the phrase 'in respect of goods' means only 'on' the goods and cannot include the raw material which is processed and converted to different output. Even if the word "attributable" is substituted for the words "in respect of", the result will not be different, for the duty paid shall be attributable to the goods. If it was paid on the raw material it can be attributable only to the raw material and not to the goods.*

It is pertinent to note that Circular No. 72/46/2018-GST dtd. 26th October 2018 issued by the CBIC talks about reversal of ITC 'attributable' to the manufactured goods. The said Circular says that in cases expired goods are returned and destroyed by the manufacturer, ITC 'attributable to the manufacture of such goods' needs to be reversed.

One may interpret that - 'in respect of goods' would have to be understood as in respect of or specific to the said goods. This interpretation would mean that ITC shall be ineligible 'only to the extent of goods' that are lost, stolen, etc.

The other school of thought would interpret to also include ITC on inputs, input services and capital goods related to the lost goods within the purview of Section 17(5)(h) [as mentioned in the Circular]. However, if the legislature intended to have such wider scope, then the same would have been expressly provided - as specified in Rule 3(5C) of CENVAT Credit Rules, 2004 or the preceding provisions such as 17(5)(d) of the Act.

Further, if Section 17(5)(h) were to include all ITC (i.e. input, input services and capital goods) attributable to the goods lost, stolen, etc., the legislature ought to have provided for a mechanism to determine the same. In the absence of any mechanism, the ineligibility shall not be tenable relying on the Hon'ble Apex Court decision under Income Tax Act in the case of *CIT v/s B.C. Srinivasa Setty* [(1981) 128 ITR 294 (S.C.)].

Issue 2: Drafting Error or Open to Interpretation?

Chapter V of the Act covers provisions related to ITC. Section 16 of the Act provides for eligibility and conditions for claiming of ITC. Section 17 which provides for apportionment of ITC (in specified circumstances) and blocked/ineligible ITC. It is followed by Section 18 which provides for availability or reversals of ITC in specified circumstances.

Thus, a taxpayer who intends to claim ITC has to first check his eligibility and has to judiciously comply with the conditions prescribed u/s. 16 of the Act. Thereafter, he is required to check if his claim of ITC is blocked u/s. 17(5) of the Act.

If his claim is covered u/s. 17(5) of the Act, the ITC is not available - notwithstanding his eligibility u/s. 16 (1). Thus, Section 17(5) clearly blocks the very 'first' claim of ITC by a taxpayer.

In light of the provisions of Section 17(5)(h) of the Act, it is baffling that the legislature expects the taxpayer to identify whether the goods on which ITC is intended to be claimed shall be lost, destroyed, stolen or written off – thereby blocking the very 'first' claim of ITC on the said goods. It is also quite possible that the taxpayer may not even know that the goods would be given as free samples or gifts.

Here based on the drafting of the provisions, an argument can be taken - that the credit blockage/ineligibility should be considered only at the time of receipt/ 'first' claim of ITC. For example, if the goods are lost/destroyed/stolen before receipt and claim of ITC - then ITC must be blocked u/s. 17(5) but not when goods are lost/destroyed/stolen after their receipt and claim of ITC. Reliance can be placed on the decision of *Grasim Industries Ltd. v/s. Commissioner* [2005 (179) ELT A38 (SC)], *Binani Cement Ltd. vs CCE, Jaipur* [2002 (143) ELT 577 (Tri. Del.)], *Spenta International Ltd. v/s. CCE, Thane* [2007 (216) ELT 133 (Tri - LB)] – wherein it has been held ITC eligibility/ineligibility has to be determined at the time of claim.

Further, one can also argue that after the receipt of goods and claim of ITC, there is no provision in the GST law that requires reversal of ITC already claimed. Reliance is placed on *CCE, Chennai III v/s. Joy Foam Pvt. Ltd.* [2015 (322) ELT 209 (Mad.)] and *Grasim Industries Ltd. v/s. Commissioner* [2007 (208) ELT 336 (Tri. - LB)] wherein it has been held that in the absence of specific provisions requiring reversal of claimed ITC – reversal of ITC cannot be made.

Note: These cases of ITC reversals ought to have been part of Section 18 – wherein instances of subsequent reversals of ITC claimed earlier have been provided. The legislature may have to consider rectifying the drafting error to iron out any scope for frivolous litigation.

Issue 3: Meaning of lost, stolen or destroyed

While the Section 17(5)(h) provides for blockage of credit on goods lost, stolen or destroyed, these terms have not been defined under the law.

The dictionary meaning of lost is 'no longer possessed', 'cannot be found or brought back' or 'not made use of'.

Similarly stolen/steal would mean 'to take away from someone without their permission' or 'to take away by unjust means'.

Also, dictionary meaning of destroy is 'to damage something so badly that it no longer exists' or 'to put out of existence'.

Thus, in light of the provision, prima facie these words mean goods that no longer remain in possession of or in existence with the taxpayer such that the taxpayer may not be in a position to put them for the use in the course of business.

Various types of loss, destruction, etc. may happen in the course or furtherance of business. An illustrative list of the same has been provided as under:

- A. Process Loss:** Usage of goods in the course or furtherance of business entails subjecting the goods to various types of processes. Each process entails a set of activities to be undertaken on the goods – wherein loss of goods can be an inherent part or an unavoidable feature. Such loss is often termed as normal loss or process loss. ITC reversal would not be required in case of such losses.

Reliance is placed on:

- **ARS Steels & Alloy Intl. Pvt. Ltd. v/s STO, Chennai [2021 (52) GSTL 402 (Mad.)]**

“Loss arising from manufacturing process - There is a loss of a small portion of inputs, inherent to manufacturing process. Reversal of input tax credit, involving Section 17(5)(h) ibid, by Revenue, in cases of loss by consumption of input which is inherent to manufacturing loss is misconceived, as such loss is not contemplated or covered by situations adumbrated under Section 17(5)(h) of Central Goods and Services Tax Act, 2017.”

- **Rupa & Co. Ltd. v/s CESTAT, Chennai [2015 (324) ELT 295 (Mad.)]**

“Inputs of such finished product' and 'contained in finished products' cannot be looked at theoretically with its semantics - It has to be understood in context of what is the manufacturing process - Every manufacturing process has some kind of loss such as evaporation, creation of by-products, etc. - Total quantity of inputs that go into making of finished product represents inputs of such products in entirety”

- **R.K. Ganapathy v/s Asst. Comm. (ST), Kangeyam [2022 (56) GSTL 129 (Mad.)]**

“Invisible loss of input during process of manufacture of Ghee - Every manufacturing process would automatically result in some kind of loss such as evaporation, creation of by-products, etc. - Appellant-assessee entitled to Cenvat credit on total quantity and value of inputs that went into making of Ghee”

- **Rollex Electro Products P. Ltd. v/s CCE [2016 (338) ELT 736 (Tri. - Del.)]**

“Once credit is taken as per law and inputs are used in manufacture of finished goods, no provision under Central Excise law to deny/restrict Cenvat credit on the ground that excess process loss has been claimed”

- **Lanxess India Pvt. Ltd. v/s CCE&ST [2022 (380) ELT 616 (Tri. - Ahmd.)]**

“Short receipt of 2% material - Appellant having sent their chemicals in water base, during process certain quantity of contaminated water was wasted; therefore, same was not capable of being returned by job worker - Cenvat credit attributed to any wastage arising during course of manufacture cannot be denied”.

B. Transit/Storage Loss: Supply of goods in the course of furtherance of business involves storage and transportation to and from the place of business of the taxpayer. Loss of goods during such storage/transportation is normal phenomena. Such transit loss may be due to differences in weightment, minor pilferages, evaporation, loss of moisture content, etc. Such losses are normal and inherent part of the transportation activity - which is an integral part of the business. Such normal loss is termed as transit/storage loss. ITC reversal would not be required in case of such losses.

Reliance is placed on:

- **UOI v/s Hind. Zinc Ltd. [2013 (294) ELT 378 (Raj.)]**

“It would be too impracticable and unrealistic to ignore in such a matter the ground realities and the natural causes where the excavated contents were being transported from mines to the factory, and where the contents were susceptible to dryage due to atmospheric conditions apart from likelihood of some slight error in recording of measurements due to human or mechanical error - No evidence that assessee had, in any manner, diverted the duty paid inputs with intent to evade duty - Credit not to be denied”

- **Ultratech Cement Ltd. v/s CCE [2015 (327) ELT502 (Tri. Mum)]**

“Short receipt of inputs - Product being cement, there may be a transit loss of goods like cement - No allegation that goods have been diverted during transit or there is any pilferage of goods during course of transportation - Shortage of input on weighing is found near about 2% of total quantity and in some cases it was found to be excess, the loss of 2% of cement during the course of transportation is to be held as mirage - As the appellant have taken credit on the basis of invoice issued by supplier and the quantity mentioned therein, credit not to be denied”

- **Hind. Petroleum Corp. Ltd. v/s CCE [2014 (307) ELT 919 (Tri. Mum)]**

“Short receipt of inputs - Transit loss - Lube base oil transported through pipeline - If any goods are transported through pipeline or by other means of transports, if they are not solid, there is every chance of loss of quantity of goods by way of evaporation - Transit loss is varying between 0.01 and 0.72% which is admissible - There may be variation in transportation of quantity of goods - Transit loss allowable - Appellant entitled for input credit as shown in invoices”

- **Bajpur Co.-op. Sugar Factory Ltd. v/s CCE [2008 (226) ELT 715 (Tri. Del)]**

“Storage loss - Loss of rectified spirit in storage due to its volatile nature and natural causes - No provision in Central Excise Act / Rules or any Circular of the Board to claim remission on quantity of rectified spirit lost on storage - Losses reported to be within permissible limit of 0.5% set by State Excise Authority - Same limit can be adopted as safe basis for allowing similar benefit under Central Excise Law - Impugned order relating to utilization of credit involved in clearance of rectified spirit as wastage set aside.”

It may be noted that any abnormal transit/storage loss of goods may require ITC reversal subject to the arguments discussed in Issue 2 above.

C. **Theft or burglary of goods:** Goods used in the course or furtherance of business can be subject to thefts, burglary, dacoity, etc. In such cases, the goods of the taxpayer seize to be in the possession of the taxpayer.

Inputs lost due to theft, burglary or dacoity shall be subjected to reversal of input tax credit availed on the same. Loss of semi-finished or finished goods due to these reasons may require reversal of ITC on the inputs used in manufacturing the same (subject to arguments in Issue 1).

However, as far as the capital goods are concerned, they are used over a period of time. Accordingly, reversal of entire credit availed on the same shall not be the appropriate mechanism.

Further, Section 18(6) covers only supply of capital goods. Sr. 1 of Schedule I of the Act covers only permanent transfer or disposal of business assets. These terms ought to be the ones where there is an active act by the taxpayer to part away the assets. Thus, loss due to theft or burglary may not get covered under the same. Consequently, one may argue that in the absence of any specified mechanism, ITC reversal is not tenable (refer arguments discussed in Issue 1 above). However, risk averse taxpayer may prudently follow mechanism prescribed in Section 18(6) of the Act.

D. **Goods lost due to destruction:** Goods used in the course or furtherance of business are often destroyed or damaged due to natural calamities, accidents, machinery breakdown/failure or human error/negligence, etc.

Any destruction of goods which is inherent part of the business/manufacturing process shall not require ITC reversal as per arguments discussed in Issue 3(A) above. However, any other destruction of goods may require ITC reversal subject to the arguments discussed in Issue 2 above.

It may also be noted that the provision makes ITC ineligible only in case of destruction of goods and not for damage of the goods (i.e. which results in reduction in the Net Realisable Value or Sale Price of the goods). Classification of the loss into damage or destruction would have to be determined on a case to case basis.

Issue 4: ITC on Promotional Schemes and Free Samples

'There ain't no such thing as a free lunch' – is a popular adage communicating the idea that it is impossible to get something for nothing or free. No business provides anything for free – unless a hidden consideration (monetary or non-monetary) is involved.

The ITC ineligibility is based on disposal of goods as 'gifts'. Thus, it is important to understand the meaning and scope of the word 'gift'. The word 'gift' has not been defined in the Act. Hence one will have to refer to other laws as well as case laws to determine the meaning of the term.

The Gift-tax Act (18 of 1958) had defined the word gift to mean transfer by one person to another of any existing movable or immovable property *voluntarily* and *without consideration* in money or money's worth.

Thus, for any transfer of goods to qualify as gift – it has to be without any contractual obligation and without any reciprocity (monetary or non-monetary). Transferor may intend to transfer the goods due to love, affection, relation and many other non-commercial factors.

Sales promotional schemes may be run under various models/mechanisms such as:

- i. **BOGO:** Buy One Get One free or 2 (or more) for the price of one is a common promotional scheme. Under these schemes same product or connected products (e.g. toothbrush with toothpaste) or even unrelated products (e.g. bag on purchase of TV) may be sold in a combo. Supplier charges for the chargeable goods but supplies the other items along. Since the combo products would be supplied together for a single price – they would qualify as composite or mixed supply. There would also be a contractual obligation of payment of consideration for the supply of the entire combo. The FAQ released by CBIC also confirms the said view. Thus, this would be considered as supply of all the goods for a single consideration (not a free supply). In the absence of any free supply, ITC shall not be ineligible.
- ii. **Target based Incentives:** Businesses often announce sales promotional schemes wherein the customers are eligible for certain white goods (laptops, gold coins, scooters, etc.) on FOC basis after achieving certain targets. Thus, the supply/transfer of white goods at a subsequent date is connected with supply of specified quantity of goods/services prior to that. Such schemes and their conditions are specified in advance and become part of the sale contract of the main supply. Since the subsequent supply of white goods is under a contractual obligation, these cannot be considered as gift. Accordingly, ITC shall not be ineligible.

Further, if a taxpayer provides own manufactured goods on FOC basis, one can argue that ITC shall not be ineligible since ITC is claimed in respect of raw materials, etc. and not in respect of the manufactured goods given on FOC basis (Refer arguments in Issue 1).

- iii. **Promotional Items:** Businesses often supply random promotional items for creating brand visibility, customer creation/retention, marketing, etc. These include supply of t-shirts, caps, stationary items, calendars, etc. containing the company logo/brand names on it. These are often supplied in general to trade channels, customers, etc. Supplier provides such promotional items without any contractual obligation on the recipient to use/promote such goods in a particular manner. Recipient also cannot demand such promotional items under any contractual obligation.

Either party cannot take legal action for the obligation to supply/use/promote the promotional items. These cases would qualify as gifts. Since majority of these products are purchased specifically for supply as free gift, ITC shall not be eligible at the time of purchase itself.

- iv. **Free Samples:** Similar to promotional items, businesses provide free samples of their own goods to the customers or trade channels. Similar to promotional items, ITC shall be ineligible subject to arguments discussed in Issue 1 and Issue 2 above.

It is worthwhile to note that unlike goods there are no provisions for ineligibility of ITC on free supply of services (for e.g. free trial subscriptions of OTT platforms, software applications, gym/fitness centres, internet services, free stays in hotels/resorts, etc.).

Issue 5: Write-off

Write-off is an accounting concept based on the fundamental principles of accounting. Taxpayers procure goods and record the said purchases at the value on which the same is procured. These goods have to be valued in the books of account as per the accounting principles i.e. for fixed goods/capital goods at Written Down Value (net of periodic depreciation) and Inventory at net realisable value.

During the course of business, there can be instances where value of these goods often diminishes more than their book value. In order to report their true value in the books, these goods are written-down (partial reduction in value) or written-off (full reduction in value) or provision is created for loss of value of the goods (goods value at book value but separate provision made for full/partial reduction).

The above 3 are considered to be different from the accounting perspective. The same is considered separate in indirect tax laws as well as can be seen with the amendments made in Rule 3(5B) of the CENVAT Credit Rules to specifically cover all of them.

Section 17(5)(h) states that ITC shall be ineligible/blocked in case of write-off of the goods. Thus, in the absence of specific provisions – ITC shall not be ineligible/blocked in case of write-down or provisions for write-off.

The obligation to forego the ITC would arise, only when the value of goods is fully written off/completely removed from the books of accounts. It may also be observed that there is no provision to take the credit back, when such goods are used subsequently.

Further, there is also no mechanism provided for ITC reversal on write-off of capital goods after usage. In the absence of any mechanism, the reversal shall not be tenable (Refer arguments in Issue 1).

Conclusion: As discussed above, the issues in the ITC provisions of the GST are manifold.

Risk averse taxpayers may opt to reverse the ITC if litigation is not commercially viable. However, they may also reverse the ITC under protest with a subsequent claim of refund (this may also face some litigation).

With the progress in GST assessments/audits by department for the initial years, these issues are likely to travel up the appellate levels owing to the legal interpretations involved. Based on the trends in the Advance rulings, it is evident that these issues are likely to travel at least up to the Tribunal (yet to be formed) before any clarity emerges on the case.

Thus, taxpayers will have to factor in the time-period along with the tax exposures while deciding on the further course of action.

Trade may also consider representation at appropriate levels to ensure that the drafting rectifications can be made to bring in broad level clarity.



IMPORTANT ASPECTS OF GST ANNUAL RETURN AND RECONCILIATION STATEMENT



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Preliminary

Applicability:

GSTR 9 - Every registered person having aggregate turnover exceeding Rs. 2 crore. [NN 10/2022 CT]

GSTR 9C - Every registered person having aggregate turnover exceeding Rs. 5 crore. [Rule 80(3)]

Persons having aggregate turnover upto Rs. 2 crore are exempted from filing GSTR 9. The “exemption” has been applicable from FY 2020-21. However, GST portal still allows to file the annual return, irrespective of the turnover. Section 74 of CGST Act deals with determination of tax liability by reason of fraud or suppression of facts. Explanation 2 of Section 74 defines suppression: "*suppression shall mean non-declaration of facts or information which a taxable person is required to declare in the return,.....*"

Considering all this, if the values provided in regular returns differ from the books of accounts, then irrespective of the aggregate turnover, a view may be taken to file the annual return.

Aggregate Turnover:

Aggregate turnover means the aggregate value of all taxable supplies....., exempt supplies,, to be computed on all India basis.....

Exempt supply means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax....., and includes non-taxable supply

non-taxable supply means a supply of goods or services or both which is not leviable to tax.....

Two observations:

1. Aggregate Turnover: India total of Taxable + Exempt + Nil Rated (& Zero Rated) + Non-taxable Supply.
2. For any transaction to form part of turnover, it should qualify to be a supply first.

Supply:

Supply as a term has not been defined in the GST law, but “Scope of Supply” has been provided in Section 7 of CGST Act. *Inter alia*, it mentions certain transactions which shall be treated neither as supply of goods nor services.

Format and Structure

Broadly, Forms GSTR 9 & GSTR 9C can be broken down into three components:

1. Tables relating to Outward Supplies and tax thereon
2. Tables relating to Input Tax Credit
3. Tax payable and paid

As a general rule, it is better to provide details in individual tables and sub-tables rather than providing consolidated figures.

Outward Supplies and Tax There on

GSTR 9 – Tables 4, 5, 10, 11, 14 and 17

GSTR 9C – Tables 5, 6, 7, 8, 9, 10 and 11

An explanation has been inserted in Section 75(12) relating to Recovery Proceedings, w.e.f 1st January 2022.

Explanation.-For the purposes of this sub-section, the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39.

The insertion was made in cognisance of Hon'ble MP High Court's judgement in case of M/s Kabear Reality Pvt. Ltd., wherein it was held that tax declared in GSTR 1 is a self-assessed tax. This paves way for the government to directly recover taxes u/s 79 without issuance of SCN u/s 73 or 74, in case of tax values in GSTR 1 be higher than in GSTR 3B. Also, as held by Hon'able Gujarat HC in case of M/s Rajkamal Builder Infrastructure Pvt. Ltd., interest on tax can also be recovered u/s 79. Care needs to be taken accordingly.

For Table 4G (RCM liability), the words in the Instructions used are: “Aggregate value of inward supplieson which tax is to be paid by the recipient.....” Hence Table 4G to include all RCM liabilities as per books and no effect be made in Tables 10 or 11.

Similarly, in case of Table 5 of GSTR 9, for Exempt, Nil rated or Exports, values may be provided as per books, irrespective of GSTR 1 or GSTR 3B and no effect of this be made in Tables 10 and 11.

Further, many taxpayers mention figures in Table 5F “Non-GST Supply” (commonly called as “balancing figure”) such that the Total of Tables 4, 5 10 & 11 is equal to revenue from operations. Examples of such figures are accounting provisions, exchange rate differences, etc.

This approach, should be avoided as it may raise questions relating to ITC eligibility and reversals (Remember, exempt supply includes non-taxable supply). Any unreconciled difference in Turnover as per books with GST better be provided in Table 6 of GSTR 9C.

For FY 21-22, it is mandatory to report under Table 17 (HSN-wise summary of outward supplies). Other reporting relaxations relating to outward supplies in GSTR 9 and Table 5 of GSTR 9C are extended to FY 2021-22.

Input Tax Credit

GSTR 9 – Tables 6, 7, 8, 12, 13, 16 and 18

GSTR 9C – Tables 12, 13, 14, 15 and 16

Unlike the Outward supplies' tables wherein details for the year are to be provided as per books of accounts, in ITC tables, ITC claimed of, and during the year as per GSTR 3B, is to be provided. There is simply no concept availment and/or utilisation of ITC via GSTR 9 or GSTR 9C.

However, like Tables 4 & 5, in Tables 6 & 7 of GSTR 9, figures pertaining to that financial year (in current scenario FY 21-22) only are expected. Hence the difference in ITC actually availed during the year vis-à-vis the total of Tables 6 & 7 should ideally be reconciled with previous year's Table 13. (and current year's Table 12 & 13 if applicable)

Specific emphasis is to be laid on Table 7H, wherein no new reversal is to be made, other than that made while filing GSTR 3Bs/ ITC 03 for the year. Any additional liability determined because of incorrect availment/ utilisation of ITC while preparing the Annual return should be reported and paid in DRC 03.

Rule 36(4) has been amended w.e.f. 1st January 2022. Prior to amendment, the rule read:

(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been furnished by the suppliers under sub-section (1) of section 37, in FORM GSTR-1 or using the invoice furnishing facility shall not exceed 5 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been furnished by the suppliers under sub-section (1) of section 37 in FORM GSTR-1 or using the invoice furnishing facility.

There is a difference between the supplier filing GSTR 1 vis-à-vis the invoice being visible to the recipient in GSTR 2A. If the supplier has filed his returns, a view may be taken to avail the ITC irrespective of GSTR 2A, for returns filed upto 31st December 2021.

It may be noted that CBIC through Press release, on 18.10.2018 clarified that furnishing of outward details in Form GSTR-1 by the corresponding supplier(s) & facility to view the same in Form GSTR-2A by the recipient is in nature of registered person facilitation & does not impact the ability of a registered person to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act.

Upto FY 2020-21 ITC in respect of invoices or debit notes pertaining to a financial year needs to be claimed within the due date of filing the returns for September of the subsequent financial year or the date of filing the annual return, whichever is earlier.

Section 16(4) has been amended by the Finance Act, 2022 and the same has been notified w.e.f. 1st October 2022 vide N.No. 18/2022-Central Tax dated 28.09.2022. The outcome of the amendment is that from FY 2021-22 ITC in respect of invoices or debit notes pertaining to a financial year can be claimed in the relevant return or the statement filed/ furnished up to 30th November of the next financial year, or the date of furnishing the annual return for the said financial year, whichever is earlier. This is also clarified by the CBIC vide press release dated 04.10.2022.

Table 8 of GSTR 9, although clarified by CBIC to be an informational table, holds increased relevance after the amendment in Rule 36(4) (Basically to claim ITC as per GSTR 2B). This statement can be furthered strengthened by Section 61, which states that the *“The proper officer may scrutinize the return and related particulars furnished by the registered person to verify the correctness of the return.....”* However Table 8 should ideally not be the only reason of initiating a scrutiny proceeding.

Table 8H talks of ITC availed on import of goods. If a taxpayer has paid more tax on import and availed less ITC, the balance ITC although claimed by Table 8K to be lapsed, but as per Section 16(4) it cannot be lapsed as Section 16(4) talks of time limits to avail ITC in case of Invoices and Debit notes, not Bill of Entry.

Figures in 8C should match with Table 13 except for ITC of RCM which can be mentioned in Table 13 but not in 8C. This should reconcile with Table 12C of GSTR 9C.

Ensure that ITC of RCM under Tables 6C + 6D + 6F be less than or equal to figures in 4G. Also note that, Table 12 of GSTR 9C talks of Net Total ITC and Table 14 has its test of eligibility.

For Tables 6, 7, 12, 13, 15, 16 and 18 of GSTR 9 and Table 14 of GSTR 9C, the reporting relaxations of earlier years continue in FY 2021-22 as well.

Tax Payable and Paid

GSTR 9 – Tables 9, 15 and 19

GSTR 9C – Table- Part V

Table 9 of GSTR 9 only allows to edit the “Tax payable” figure, hence should include tax payable on any additional liability and be paid via DRC 03. Any difference in tax on outward supplies between GSTR 3B and GSTR 1 be effected here.

Instructions to GSTR 9 clearly state that any tax payable determined to be paid in cash via DRC 03. This may be because of Section 41, which states *“Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to avail the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited to his electronic credit ledger.”* The widely accepted view is that liability determined while filing of GSTR 3B (and GSTR 1) is considered to be self-assessed.

However, one may also refer Section 49, which states *“The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Actin such manner and subject to such conditions and restrictions within such time as may be prescribed.”*

Further *“output tax in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;”*

So, can a view be taken to discharge Annual return/ reconciliation liability via ITC? Let the readers decide. (If this view is taken, one may also save on interest liability as per Section 50)

Further, if the judgement of Hon'ble Supreme Court in case of VKC Footsteps is followed on Inverted Duty Structure, then in case of any refund received, the same may be suo moto paid back along with interest. This may also be reported in Part V of GSTR 9C.

Other aspects

E Invoicing

Applicable to taxpayers with annual aggregate turnover in ANY year from FY 17-18 exceeding Rs.100 crores (w.e.f. 01-04-2021). The reduced limit of Rs. 20 crore is w.e.f. 01-04-2022 and Rs. 10 crore w.e.f. 01.10.2022.

Improper compliance by supplier and recipient may lead to penalty u/s 122 of Rs. 10,000 or tax evaded, whichever higher and a general penalty of Rs. 25,000. There can also be ITC disallowance to the recipient and a threat of vehicle interception to supplier.

Audited Financials

Section 44: Annual Return

Every registered person,shall furnish an annual return which may include a self-certified reconciliation statement, reconciling the value of supplies declared in the return furnished for the financial year, with the audited annual financial statement for every financial year electronically, within such time and in such form and in such manner as may be prescribed:

Sub rule 3 of Rule 80

Every registered person,whose aggregate turnover during a financial year exceeds five crore rupees, shall also furnish a self-certified reconciliation statement as specified under section 44 in FORM GSTR-9C along with the annual return referred to in sub-rule (1), on or before the thirty-first day of December following the end of such financial year,

Thus, there is no mandatory requirement to furnish audited annual accounts. However, the portal asks to upload Balance Sheet and Profit and Loss account of the period of return. Obviously the law will hold supremacy over the GST portal. Hence a view may be taken, especially in cases of persons who aren't required to get their accounts audited under any other law, to not upload complete financials, rather an abridged version or simply upload figures relevant to GSTR 9 and GSTR 9C.

Constituents

Clause (aa) to Subsection 1 of Section 7 of CGST Act states that supply includes, “*the activities or transactions, by a person, other than an individual, to its members or constituents or vice-versa, for cash, deferred payment or other valuable consideration.*”

Explanation: For the purposes of this clause,the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another”

Although this amendment was introduced to basically tax clubs and associations, the undefined term “constituent” can have a very wide implication. For example, can a partner be termed as a “constituent” and the services for which he gets remuneration be called a supply under this clause?

Certain other questions remain which we'll find answers in course of time, like:

1. ITC eligibility on expenses disallowed u/s 37 of the Income Tax Act.
2. Applicability of Section 16(4) in case of delayed filing of regular returns.
3. Implications of onus on the taxpayer to provide "true and correct" details.
4. No support of "auditor's comments/disclaimers" in GSTR 9C.

Section 126(5) states "When a person voluntarily discloses to an officer under this Act the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer under this Act, the proper officer may consider this fact as a mitigating factor when quantifying a penalty for that person." So, prepare and provide appropriate details, reconciliations and disclosures in GSTR 9C / DRC 03 itself for mitigating the risk of high penalties.

To provide legal strength to certain well accepted views, below are some case laws

1. Mysore Electricals [SC]

A clarification/circular beneficial to the assessee will have a retrospective implication and an oppressive one will have a prospective implication.
(<https://indiankanoon.org/doc/971863/>)

2. Bengal Iron [SC]

Any circular or clarification issued by the Central Government or the State Government is merely an opinion of the officers it is not binding on the court meaning thereby it's not the law.
(<https://main.sci.gov.in/jonew/judis/12043.pdf>)

3. Start India Pvt Ltd [SC]

The liability to pay interest and/or penalty would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively (via a retrospective amendment) could not entail the punishment of payment of interest with retrospective effect.
(<https://indiankanoon.org/doc/852405/>)

4. Whirlpool Corporation [SC]

Writ can be filed in high courts even if alternate remedies are available, provided principles of natural justice aren't followed.
(<https://indiankanoon.org/doc/1885496/>)

5. Parle International [Bombay HC]

When a matter is brought before the Court or the Court is examining the matter, department cannot initiate or proceed with a parallel proceeding on its own.
(<https://indiankanoon.org/doc/80971808/>)

(For more details, one can refer ICAI's handbook on Annual Return under GST published a few days back. One may also refer the Technical guide on GST Audit published in January 2021. Both are available for free download on idt.icai.org.)



SCRUTINY ASSESSMENT & APPEALS



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Introduction:-

These days, many taxpayers are getting GST return discrepancy notices in the form of GST ASMT-10. The GST Law came into force in July 2017; however, the department has now started scrutinizing the GST returns filed during the last five years, if he finds any error, he will issue a scrutiny notice to the registered tax payer demanding an explanation. We would understand the provisions and impact of such type of notices in detail.

What is GST ASMT-10?

Form GST ASMT-10 is the notice issued under **Section 61** of the CGST Act, 2017, read with **Rule 99** for intimating discrepancies in the GST returns filed by the taxpayer and seeking an explanation for same. The tax officer can send the notice to the taxpayer via SMS or Email.

As per section 61, a GST Officer scrutinises the GST returns filled by the tax payer based on certain risk parameters. This assessment is undertaken to verify the correctness of details submitted in GST returns and find discrepancies in the return. Few examples of discrepancies against which notice can be issued are as follows: -

- Difference in Tax Liability reported in GSTR-1 and GSTR-3B
- Difference in ITC claimed in GSTR-3B and GSTR-2B/GSTR-2A
- Difference in Tax Liability as per E-Way Bill and GSTR-3B
- High deviation in Tax deposited during two or more periods
- Claimed ineligible exemption or ineligible ITC etc.

If such discrepancies indicate a high risk of default or fraud, then the officer can proceed to this assessment by issuing notice under GST ASMT -10.

GST ASMT-10 is merely a notice where discrepancies in GST Returns filled by the tax payer are found and intimated to the tax payer; asking for an explanation for the same. The Proper Officer may quantify the amount of tax, interest or any other amount payable by the taxpayer in the GST ASMT-10 itself. However, there is no personal hearing in this assessment.

Contents of Form GST ASMT -10:

- **Basic Details:** - GSTIN, Name, Address and Tax Period
- **Discrepancies Observed:** - Details of discrepancies observed and asking for explanation
- **Details of Tax Officer:** - DIN, name, Signature and designation of tax official issuing Notice

How to file a reply to GST ASMT -10?

As per section 61, tax payer is required to file a reply via GST ASMT -11 online on GST portal within 30days of its issuance. He may request for extension of not more than 15 days.

However, 2 scenarios may arise here: -

- Tax Payer agrees with the discrepancies noted: - Tax payer is required to pay the tax, interest or any other amounts as specified in GST ASMT -10 via DRC-03 and then inform the Tax officers via ASMT 11. Payment can be made via following ways:
 - Pay tax in Form DRC 03
 - Furnish Invoice/ debit note/ amended Invoice / amended debit note in GSTR 1
 - Pay tax while filing GSTR3B
- Tax payer Disagrees with the discrepancies noted: - Tax payer may provide explanation and workings& reconciliations along with the supporting documents to the Proper Officer via GST ASMT - 11

Procedure after replying to Scrutiny Notice:

After submitting reply under GST ASMT -11, there can be again 2 scenarios: -

- Proper Officer is satisfied with the response, then he'll drop the proceedings by issuing an order under GST ASMT - 12, intimating the same to the tax payer
- If Proper officer finds that reply is not satisfactory; then he may take appropriate actions under following sections: -
 - Section 65 – Audit by Tax Authorities
 - Section 66 – Special Audit
 - Section 67 – Inspection, Search or Seizure

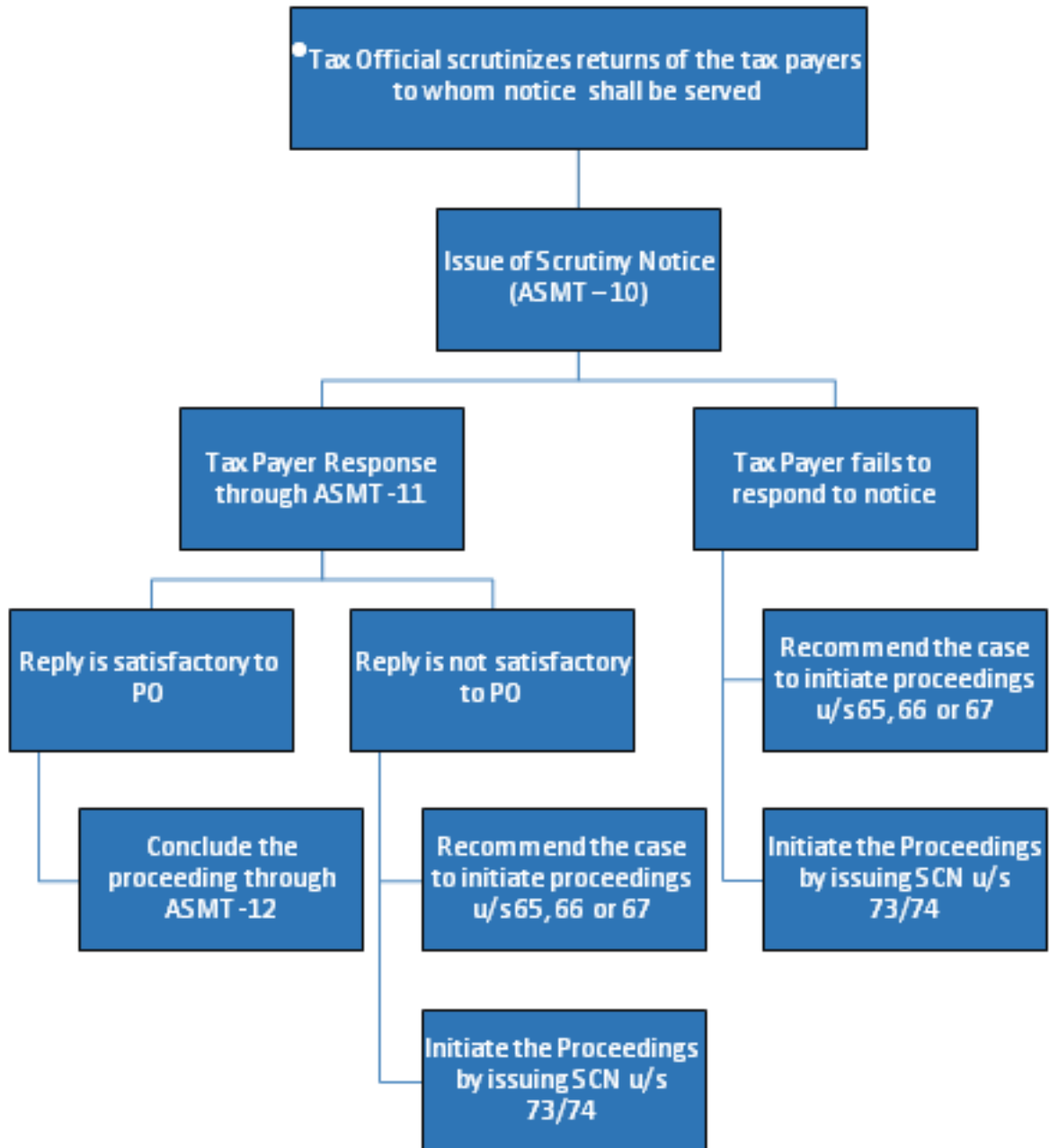
Based on the findings under above sections, actions can be initiated under section 73 (Non fraudulent cases) or section 74 (fraudulent cases) of the CGST Act, 2017.

However, there is no timeline for the issue of GST ASMT -12. The proceedings get concluded with the receipt of GST ASMT-12.

Consequences of not Responding to a Scrutiny Notices:

If the taxpayer does not respond to the scrutiny notice, then the tax officer will take action under section 73 (non-fraudulent) and 74 (fraudulent). He can issue a show-cause notice in form DRC-1 demanding the tax dues, together with interest and penalty. The amount of penalty will vary depending upon the grounds of the discrepancy found. Alternatively, the officer can recommend audits under section 65, 66 or 67.

The above discussion can be summarised as below: -



Appeals under GST:

Any person aggrieved with the order passed by the adjudicating authority under the GST Act; can file an appeal in GST before the First Appellate Authority. Therefore, if the tax payer is aggrieved by the order passed u/s 73 or sec 74 he may opt to make an appeal before the First Appellate Authority

Appealable Orders:

- Enforcement Order
- Assessment or Demand Order
- Registration Order
- Refund Order
- Assessment Non Demand Order
- LUT Order

How to file an Appeal:

An appeal can be filled in Form GST APL -01, along with relevant documents. As soon as appeal is filled, provisional acknowledgment will be issued immediately. However, the final acknowledgment, indicating the appeal number shall be issued in Form GST APL-02, only after the manual submission of Form GST APL - 01 along with attested copy of order appealed against within 7 days of issuance of provisional acknowledgment. The date of filing of appeal shall be the date of submission of such copy.

Time lines to file an Appeal:

The time limit to file an appeal is within 3 months from the date of communication of order by adjudicating authority. However, delay of maximum upto 1 month is allowed that to only after furnishing of a justified reason of delay along with suitable evidence.

Appeal Fees: - No Appeal fee is levied as such.

Requirement of Pre-Deposit before filing an Appeal:

During filing an appeal, a specific amount has to be paid as pre-deposit as per below:

- In respect of the amount admitted – 100% of tax, interest, fine, fee and penalty
- In respect of the disputed amount – 10% of the tax in dispute, subject to maximum of Rupees 25 cr.

However, in case with respect to detention & seizure – 25% of the penalty as specified in the order needs to be paid.

When the pre -deposit amount is paid by the appellant, then the recovery proceedings for the balance amount shall be deemed to be stayed.

Adjournment of Hearing:

The Appellate authority may adjourn the hearing upto three times on showing of sufficient cause at any stage of hearing.

Appellate Authority shall give an opportunity to the appellant of being heard

Can additional grounds be added during the hearing?

If the authority is satisfied that the omission of that ground was not wilful or unreasonable, then additional grounds can be added at the time of hearing.

Time limit to issue an order:

Every appeal shall be decided within a period of one year from its filing, if it is possible to do so for the authority. Every order passed under section shall be final and binding on all the parties involved subject to sections 108, 113, 117 or 118

Refund of Pre-deposit:

When the pre deposit is amount liable to be refunded according to appellate authority's order, the tax payer may file a refund application then the amount of pre-deposit shall be refunded along with interest from the date of payment of such amount till the date of refund.

Not satisfied with the order of First Appellate Authority:

If the aggrieved person is not satisfied with the order of the First Appellate Authority too, then he may go for an appeal before -

- Appellate Tribunal
- High Court
- Supreme Court

The Appellate Tribunal is not yet constituted; so currently appeals cannot to be filled with Appellate Tribunal. Therefore, the time limit to make an application to appellate tribunal will be counted from the date on which President or the State President enters the office - this has been clarified vide Circular No. 132/2/2020 GST dated 18.03.2020

Conclusion: -

In recent times, a lot of taxpayers are getting scrutiny notices and the taxpayers are ignoring the same. It is advised not to ignore the ASMT 10 notices at all. It can cost taxpayers heavily in the form of time, efforts and tax liabilities if not dealt within a time bound manner.



EVENTS IN RETROSPECT

Day & Date	Committee	Program Name	Moderator / Speaker	Attendance / Views
Wednesday, 12th October 2022	Study Circle Committee	Accounting Standards for Non-Corporate Entities	CA Harsh Dedhia	45 participants
Saturday, 15th October 2022	Program Committee	Do's and Don'ts while buying an Immovable Property	Solicitor Dhiren Nandu	220+ participants

