

**Part-100-One Pager Snapshot to the Latest Cases on entitlement of ITC as per the provisions of Section 16-Part-III**

**CA Arpit Haldia**

S.N.	Case Subject	Case	Held
1.	Before directing the recipient to reverse ITC, the authority ought to take action against the supplier and unless and until authority was able to bring out exceptional case as clarified in the press release issued by CBIC, straight away, authority was not justified in directing the appellant to reverse the ITC	<b>Suncraft Energy (P.) Ltd. v. Assistant Commissioner, State Tax [2023] 153 taxmann.com 81 (Calcutta)</b>	<b>The allegation against</b> the appellant was that the supplier has not shown the Bill in GSTR 1 and hence the appellant is not eligible to avail ITC as per section 16(2). SCN did not allege that appellant was not in possession of tax invoice and that the appellant has not received the goods or services or both. <b>The court referred</b> to decision of Apex Court in the matter of Union of India (UOI) v. Bharti Airtel Ltd. [2022] 4 SCC 328 wherein effect and purport of Form GSTR-2A was explained that it is only a facilitator for taking a confirm decision while doing such self-assessment. Non-performance or non-operability of Form GSTR-2A will be of no avail because dispensation stipulated at the relevant time obliged registered persons to submit return on the basis of such self-assessment in Form GSTR-3B manually on electronic platform. The Court relied upon <i>Arise India Ltd. v. Commissioner of Trade and Taxes, Delhi</i> . <b>The Court referring to press release dated 18-10-2018 observed</b> that the authority had not conducted any enquiry on supplier more particularly when clarification has been issued where furnishing of outward details in Form GSTR 1 by a corresponding supplier and the facility to view the same in Form GSTR 2A by the recipient is in the nature of tax payer facilitation and does not impact the ability of the tax payers to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. <b>Furthermore, Press release dated 4<sup>th</sup> May 2018</b> was also referred wherein it was clarified that there shall not be any automatic reversal of ITC from buyer on non-payment of tax by seller and in case of default in payment of tax by seller, recovery shall be made from seller however, reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc. <b>Thus, it was held</b> that the action of the proper officer was branded as arbitrarily as it carried without resorting to any action against the supplier and ignoring the tax invoices produced by the appellant as well as the bank statement to substantiate that they have paid the price for the goods and services rendered as well as the tax payable there on. Therefore, before directing the appellant to reverse ITC, the authority ought to have taken action against the supplier and unless and until authority was able to bring out exceptional case where there was collusion between appellant and supplier or where supplier was missing or supplier had closed down its business or the supplier did not have any assets and such other contingencies, straight away the authority was not justified in directing the appellant to reverse the ITC. Therefore, demand raised on the appellant was held not to be sustainable. <b>The order was set aside</b> with a direction to first proceed against supplier and only under exceptional circumstance as clarified in press release by CBIC, proceedings be initiated against appellant.
2.	ITC not allowed as tax cannot be paid on invoices issued post cancellation of registration of supplier	<b>Jai Balaji Paper Cones v. Assistant Commissioner Sales Tax [2023] 152taxmann.com 690 (Madras)</b>	<b>The case of</b> the petitioner is that the petitioner has paid an amount of Rs.4,14,000/- to the supplier by including the GST payable of Rs.4,14,000/- on three invoices. It was submitted that since the petitioner has paid the tax due to the supplier on invoice dated 23.11.2018, thus they cannot be asked to pay IGST. <b>The court by</b> referring to Section 16(2) (c) of CGST Act, 2017 stated that a registered person is not entitled to credit of input tax in respect of any supply of goods or services of both, if tax is not paid to the Government. The registration of the supplier was cancelled on 31.10.2018 before three invoices dated 23.11.2018 were raised. Thus, it was clear that supplier could not have paid the tax to the ex-chequer. Therefore, it was held that there cannot be a mandamus to the authority contrary to the provisions of the respective GST Act of 2017 and the Rules made thereunder and the petition as dismissed. It was further stated that the petitioner was however entitled to recover the amount from the suppliers in the manner known to law.
3.	Time limit prescribed for claiming ITC u/s 16(4) is not violative of articles 14, 19(1)(g) and 300-A of the Constitution of India.	<b>[2023] 152 taxmann.com 640 (Andhra Pradesh) Thirumalakonda Plywoods v. Assistant Commissioner - State Tax</b>	<b>The Court observed</b> that Section 16(2) does not appear to be a provision which allows input tax credit, rather ITC enabling provision is section 16(1). On the other hand, section 16(2) restricts the credit which was otherwise allowed to only such cases where conditions prescribed in it were satisfied. Therefore, section 16(2) in terms only override the provision which enabled the ITC i.e., section 16(1). This is evident from the manner in which Section 16(2) is couched. The <i>non obstante</i> clause in section 16(2) is followed by a negative sentence "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". This negative sentence pellucidly tells that unless the conditions mentioned in section 16(2) are satisfied, no credit will be eligible. This stipulation manifests that section 16(2) is not an enabling provision but a restricting provision. What it restricts is the eligibility which was otherwise given U/s 16(1). Hence unless such clear inconsistency is established, overriding effect cannot be given over other provisions. In the present case both Section 16(2) and (4) are two different restricting provisions, the former providing eligibility conditions and the later imposing time limit. Further, influence of a <i>non obstante</i> clause has to be considered on the basis of the context also in which it is used. Therefore, section 16(4) being a non-contradictory provision and capable of clear interpretation, will not be overridden by <i>non obstante</i> provision u/s 16(2). Thus, in substance it was held that section 16(1) is an enabling clause for ITC; 16(2) subjects such entitlement to certain conditions; section 16(3) and (4) further restrict the entitlement given u/s 16(1). That being the scheme of the provision, it is out of context to contend that one of the restricting provisions overrides other two restrictions. Another way of looking it was that if really legislature had no intention to impose time limit, there was no necessity to insert Section 16(4) and to further intend to override it through section 16(2). <b>The Court further</b> observed that mere filing of the return with a delay fee will not act as a springboard for claiming ITC and referred to the argument by learned Advocate General wherein it was stated that collection of late fee is only for the purpose of admitting the returns for verification of taxable turnover of the petitioner but not for consideration of ITC. Such a statutory limitation cannot be stifled by collecting late fee. <b>The Court observed</b> that ITC being a concession, the legislature is within its competency to impose certain conditions, including time prescription for availing such right. <b>Thus, time limit</b> prescribed for claiming ITC u/s 16(4) is not violative of articles 14, 19(1)(g) and 300-A of the Constitution of India.