

Restriction on Availing of ITC wide Rule 36(4) of CGST Rules, 2017- Related Issues

DISCLAIMER:

The views expressed in this article are of the author(s). The Institute of Chartered Accountants of India may not necessarily subscribe to the views expressed by the author(s).

The information cited in this article has been drawn from various sources. While every effort has been made to keep the information cited in this article error free, the Institute or any office of the same does not take the responsibility for any typographical or clerical error which may have crept in while compiling the information provided in this article.

Introduction:

Rule 36(4) of CGST Rules, 2017 seems to be new addition to the much talked and debated amendments in GST law so far. In order to curb the problem of wrongful availment of Input Tax Credit(ITC), CBIC has made amendment to the GST provisions by inserting a new rule i.e. Rule 36(4) of CGST Rule, 2017 through **notification no.49/2019-Central Tax dated 09.10.2019**, which States that :

“(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 uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 10¹ per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.”.*

As per the said rule –

- Input tax credit to be availed by a registered person in respect of invoices or debit notes,
- the details of which have not been uploaded by the supplier under section 37(1),
- shall not exceed 10% of the *eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under section 37(1).

Accordingly, input tax credit is not available in excess of 10% more of invoices uploaded by the supplier.

(*For the purpose of this notification, eligible ITC means credit of those invoices and debit notes, the details of which are uploaded by the supplier.)

Provisions and implications of the said rule:

¹ W.e.f 1st Jan, 2020 changes to 10% from 20% earlier notified on 9th Oct, 2019 when inserted.

Before the said notification, the taxpayer claimed ITC on a self-declaration basis in GSTR-3B. Even if the GSTR-2A reflected less ITC than the books of account, taxpayers could still make their ITC claim in full in the GSTR-3B, and the unreflected amount was treated as provisional credit.

After the implementation of rule 36(4), the provisional ITC amount will be restricted only to the extent of 10% of the eligible ITC value already reflected in the GSTR-2A for that period.

For Example:

Registered person Mr. A receives inward supplies involving ITC of Rs. 10,00,000/- but GSTR 2A of the same month reflects ITC of Rs. 6,00,000/-. Mr. A can claim ITC as :

ITC Reflecting in GSTR 2A	6,00,000/-
10% of eligible ITC (as per Notification No. 75/2019–Central Tax) (6,00,000*10%)	60,000/-
Eligible ITC to be taken in GSTR 3B	6,60,000/-

The balance ITC of Rs. 3,40,000 can be claimed in any of the succeeding months provided the details of requisite invoices are uploaded by the suppliers.

In simple words, taxpayer may avail full ITC in respect of a tax period as and when the invoices are uploaded by the suppliers to the extent of Eligible ITC.

ITC outside the purview of Rule 36(4) for calculation:

- a) ITC available on the Bill of Entry against import of goods.
- b) ITC available on RCM (including import of services/ 9(3), 9(4) etc)
- c) Invoice issued by Input service Distributor since its credit appears In GSTR-6A.
- d) Re-availment of credit under rule 37
- e) Re-availment of credit after year under calculation of Rule 42
- f) ITC claimed through ITC-01, ITC02, TRAN-1, TRAN-2 and TRAN-3

Before getting into the intricacies of the said rule let us consider its pros:

- Regularity in filing of GSTR-1 by the registered persons.
- No ITC would be claimed against fake invoices raised.
- Registered persons would report their outward taxable supplies in totality due to ITC matching mechanism.

Impact on Tax Payers :

- This new rule would affect the working capital of the tax payer since he would be required to pay the liability in cash, despite having Eligible ITC on payment of taxes to its supplier.
- Moreover, the taxpayer would not be able to claim refund of excess tax paid by them due to default of the suppliers.

- It becomes vital for a business to regularly reconcile their purchase data between their books and the GSTR-2A.

Practical difficulties in implementation:

1. Quarterly Return Filers:

Registered persons who have opted for quarterly filing of GSTR-1 shall file their returns on quarterly basis, but at the same time, as per the GST law the taxpayer is required to file GSTR-3B on monthly basis.

As a result, the taxpayer is not able to claim the input in the same month in which GST is paid by him on his inward Supplies.

The taxpayer would be able to claim the credit nearly after 4 months.

This will create hardship for small taxpayers as recipients would try to get supplies from the dealers who opt for monthly filing of GSTR-1.

2. GSTR 2A Reconciliation:

- Registered person needs to execute compliance of preparing monthly reconciliation of credits vis-a-vis GSTR-2A, to ensure availment of unmatched credits only upto 10 percent of eligible credits reflecting in GSTR-2A.

- Another difficulty arises is that, GSTR-2A being dynamic report it is not possible for the taxpayer to get the same report as it stood on past date.

- To illustrate the same :

MR. A's inward supplies for the month of Jan 2020 involves ITC of Rs. 1,00,000. GSTR-2A of Jan 2020 reflects Rs. 70,000. ITC that can be claimed in GSTR-3B of Jan 2020 is as:

Particulars	Amount(Rs.)
ITC as per Purchase Register of Jan 2020	1,00,000/-
ITC reflecting in GSTR-2A of 11 th Jan 2020	70,000/-
ITC that can be claimed as Provisional Credit (70,000*10%)	7,000/-
ITC can be claimed in GSTR-3B in Jan 2020	77,000/-

Balance ITC of Rs. 23,000/- can be claimed as :

In the above example, if invoices of Rs. 15000/- gets uploaded by the supplier in Feb 2020 then ITC to be claimed in Feb 2020 in respect of Jan 2020 would be :

Particulars	Amount(Rs.)
Invoices uploaded in Feb 2020(Eligible ITC)	15,000/-

Provisional Credit can be claimed in Feb 2020. (15000*10%)	1,500/-
Total ITC to be claimed in Feb 2020	16,500/-
Balance ITC still not claimed for Jan 2020 (1,00,000-77,000-16,500)	6,500/-

(Note: The restriction of 10% provisional credit will not be supplier-wise, it is linked to total ITC from all suppliers)

- **Also, this balance credit in Jan 2020 will be required to be reconciled in every subsequent GSTR-3B to be filed by the taxpayer and it may last, unless all the invoices of Jan 2020 are reported by the supplier. This may lead to an unending working for the taxpayer for every month until and unless the entire eligible ITC is claimed by the taxpayer.**

3. Refund in case of unutilized ITC:

- Since the taxpayer is required to discharge his tax liability at the time of filing GSTR-3B, GST payable in excess of the maximum eligible ITC as per rule 36(4) would be required to be settled in cash.
- In such case, if ITC credited to Electronic Credit Ledger remains unutilised due to higher tax rate on inputs than the outward supplies, the tax payer is required to claim the refund of ITC which involves other compliances.

4. Cost of Blocked working capital:

- The taxpayer's funds get blocked as he is required to pay taxes on inward supplies as well as on the outward supplies, unless the invoices get reflected in GSTR-2A.

Government's determination to deny credit to recipient if supplier fails to deposit GST; and face another trail similar to the one in Arise India. But until then, trade is faced with this determination that presents itself in the form of rule 36(4) that was notified to apply to all returns filed from 9 Oct 2019.

Authority to 'prescribe' ways in which eligible credits would be restricted lies in section 43A of Central GST Act but that section is yet to be notified; however, restricting unmatched credits "up to 10 per cent" has already been rolled out by a new rule 36(4). Whether this too is an 'impossible eventuality' will certainly be put to Courts to answer but trade will require to self-assess the extent of 'credit overdraft' that will be tolerated in the form of this new rule. GST promised to allow seamless flow of credit, but this seems farther from that truth.

Arguments 'for' and 'against'

The case for the Government is that 'credit cannot be allowed of tax that has not reached the Government'. And 'seamlessness' is actually a promise to 'flow what's there to be flowed'. And if tax has not reached the Government, there's nothing to 'flow' to the recipient. If a Recipient can take care to verify that right quantity and quality of supplies were delivered and that Supplier can take care to issue invoice and collect payment in time, can Government be expected to look into remittance of this tax with no responsibility

shouldered by parties involved in carrying out the taxable supply? Can parties to the taxable supply still take shelter under ‘impossible eventuality’?

The case of trade is entirely different because the recipient cannot be held responsible for failure of supplier. Hon’ble Supreme Court has held that tax credit is ‘indefeasible and vested right’ in Eicher Motors Ltd. v. UoI 1999 (106) ELT 3 (SC). Question would, therefore, revolve around ‘time of vesting’. If it is a right that is ‘not yet vested’ (or *inchoate right*), then such unvested rights are for non-vesting. And if right has already vested, then its indefeasible and leaves no room for the Government to unsettle it. In fact, Hon’ble Gujarat High Court, although on other grounds, reiterated this principle while striking down a questionable *proviso* in notification 20/2018-CT(R) dated 26 Jul 2018 in Shabnam Petrofils (P) Ltd. v. UoI in CA 16213 of 2018 (Guj.) that attempted to ‘lapse’ vested credits.

Jury is out as to on whose side does ‘balance of convenience’ lie; and whether this was the real meaning of responsibility that taxpayer bargained for while seeking “minimal Government, maximum governance”. Government would say “yes”, because GST is a ‘self-assessment’ tax where tax administration has retained authority to interfere only by exception, howsoever extensive and pervasive these exceptions may be.

* * * * *

XX

Acknowledgements

We thank CA. Sanjay V. Goyal for drafting this article and CA. Jatin Christopher for reviewing the same. For any queries, you may connect with them at dtc@icai.in .

- GST & Indirect Taxes Committee