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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

INPUT TAX CREDIT UNDER GST: A VESTED RIGHT OR A CONCESSION?

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ABSTRACT

The core philosophy behind implementation of Goods and Service Tax (“GST”) Laws was to remove the cascading effect of taxes, inefficiencies and complexities of the erstwhile taxation regime and to accelerate the growth of economy. After series of recommendations of various expert committees and task forces over several decades, GST was finally implemented from 1st July 2017 and various taxes such as Entry Tax, VAT, Central Excise, Service Tax etc were subsumed under GST. The intent to remove cascading effect of taxes was reflected in the *First Discussion Paper on Goods and Services Tax in India* issued by the Empowered Committee of State Finance Ministers, New Delhi, dated 10.11. 2009 wherein the need for a continuous chain of input tax credit (“ITC”) was emphasized to relieve the tax burden on consumers and reduce compliance costs.

With the aforesaid objective, the provisions were incorporated under GST laws to facilitate input tax credit (“ITC”) to the recipients which could be used to set off output tax liability. However, the claim of ITC is highly contested by tax department under GST, sometimes on the basis of violation of substantive conditions and sometimes on the basis of procedural infractions. It is seen that apart from cases involving fraudulent ITC, the tax department does deeper scrutiny even in cases where the ITC claim of taxpayer is substantially covered within the provisions of law thereby making such claim an accrued right. However, the evolving jurisprudence reveals that ITC is increasingly being viewed as a concession or a benefit being given by the Government and cannot be treated as a vested or accrued right in every case even when there is breach of procedural conditions. Thus, it is imperative for the tax payers to adopt a precautionary approach while claiming ITC to avoid interest and penalty implications under the provisions of GST laws.

I. INTRODUCTION

Value Added Tax (“VAT”) was introduced with the objective to levy tax only on the value addition made by the taxpayer. Thus, the concept of VAT credit allowed manufacturers or service providers to claim credit for the input taxes paid on goods and services used in the production of their output supplies. The concept was integrated under GST regime took as Input Tax Credit (“ITC”) whereby setoff of input tax is allowed against output tax ensuring that tax is applicable only on the value addition. However, as far as nature and treatment of ITC is concerned, there has been a shift in the treatment of cenvat credit or ITC from the erstwhile regime to GST. The claim of ITC is now subjected to a deeper scrutiny than before to ensure that the claim is proper in all respect and is not leading to revenue loss to exchequer owing to false ITC claims. Since credit is nothing but tax paid on inputs which can be used to set off tax applicable on output side, cases of bogus claim of ITC, fake ITC has also become rampant. While on one hand, such cases need to be dealt with strictness ensuring that only legit claims of ITC are allowed, it is seen that in other cases also tax department is applying higher standards for allowing ITC claims. The notion that ITC becomes a vested right, once the taxpayer has fulfilled all substantive conditions has been gradually diluted and it is increasingly being viewed as a concession than a right. In the present article, the authors have examined the nature of ITC in the GST regime while discussing the decision of the Hon’ble Apex Court in the case of *Chief Commissioner of CGST v. Safari Retreats Pvt. Ltd.*¹

II. History and evolution of CENVAT Credit

The concept of credit was created to prevent the cascading impact of taxes by allowing the offsetting of taxes already paid on supplies. This system was put in place to ensure that taxes are only levied at the end-stage, i.e., destination or consumption of a particular supply. The scheme was expanded and credit of duty paid on capital goods was also brought under the scheme in the year 1994 and the scheme was renamed as CENVAT Credit. Further, a need of a unified and robust taxation system was recognized for the first time in 2009 when the Central Government passed a ‘White Paper on Discussion of GST’, wherein the issues of erstwhile regime such as cascading effect and setting off/credit on input taxes were discussed and it was noted that introduction of GST is essential for free-flow of tax credit. Accordingly, the concept of ITC was incorporated under GST laws under S. 16 of the Central Goods & Service Tax Act, 2017 (“CGST Act”). Chapter V of the CGST Act deals extensively with eligibility, conditions

¹ *Chief Commissioner of CGST v. Safari Retreats Pvt. Ltd.* (2024) 23 Centax 62 (S.C.).

and restriction of ITC in the GST regime.

III. Eligibility, Conditions and Restrictions to avail ITC under the CGST Act, 2017

The benefit of ITC is available only on fulfillment of certain conditions. The terms and conditions are stipulated under Section 16 (1) of the Act. Further, Section 16(2) to 16(4) state the conditions which are required to be fulfilled to avail the ITC and Section 17 and 18 mention restrictions of blocked credit/apportionment of credit availment under the Act. Relevant extract of the provisions is as follows:

“16. Eligibility and conditions for taking input tax credit:

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding 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;

(b) he has received the goods or services or both.

(ba) the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;

(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 utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

.....”

To summarize, the eligibility to avail ITC is there, when a person is a registered person and fulfills conditions as stipulated. Further, ITC on receipt of goods or service or both can be claimed, if the same are used or intended to be used in the course or furtherance of business. Further, once a taxpayer fulfills the eligibility criteria of Section 16(1), it is to be seen that the conditions mentioned in Section 16(2) are also met by the taxpayer such as possession of tax invoice or debit note to substantiate that tax has been paid on the concerned supply; reflection of details in the relevant returns of the supplier; receipt of the said goods or services; payment of the tax to the government and filing of the relevant returns.

Thus, ITC is available to a person only and only on meeting the eligibility criteria mentioned in Section 16(1) and on fulfillment of conditions mentioned in Section 16(2). Here, it is important to mention that the scheme of ITC and setting off of credit is a legislative scheme and as discussed, the legislature is empowered to impose restrictions on availment of the ITC. These restrictions are imposed with the intention that there is no revenue loss to the Government and that no credit is made available to the taxpayer where the tax chain is broken or the taxpayer is involved in making exempt supplies etc.

IV. ITC Restrictions under GST on inputs or services used in immovable property

In GST regime, restrictions on availment of ITC are mentioned in Section 17 of the Act. As per Section 17(5)(c) and 17(5)(d), ITC on works contract and construction services is restricted. The provisions read as follows:

“17(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

...

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation.- For the purposes of clauses (c) and (d), the expression "construction"

includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;”

As per Section 17(5)(c) ITC is not available on works contract services supplied for construction of immovable property, except when such supply is for construction of a *plant and machinery* or such supply is made for further supply of works contract service (is in course of one's business). Furthermore, as per Section 17(5)(d) ITC is not available on goods or services used in construction of immovable property, except *plant or machinery*, on his own account and such restriction also covers the scenario wherein the supply is made in the course or furtherance of business.

The intent of the legislature behind restricting ITC on immovable property is because immovable property (such as land, buildings, etc.) is not subject to GST and thus, no ITC is available for inputs such as raw materials, consumables, capital goods, input services, etc., which are directly used or consumed in building immovable property.

V. Decision in Safari Retreat's case

The aforesaid restriction placed on availment of ITC on construction of immovable property was challenged by taxpayers in *Safari Retreats Private Limited vs. Chief Commissioner of CGST*² wherein the business of the petitioner, *inter-alia*, consisted of construction of shopping malls (immovable property) and letting them out to different persons on rental basis (taxable output supply). The said rent income was subject to levy of CGST & State GST since the construction of immovable property was further used in the course of business of the petitioner, the petitioner was of the view that credit scheme is applicable to him however, the credit was denied by the Department in light of Section 17(5)(c) and 17(5)(d). Aggrieved by the decision of the Department, the petitioner approached the Hon'ble High Court of Orissa. The Hon'ble High Court found merit on the submissions made by the petitioner and read down Section 17(5)(d) and allowed the benefit of credit to the assessee on goods or services used in construction of immovable property if the assessee is required to pay GST on the rental income arising out of the investment on which he paid the GST. The Department challenged this decision before the Hon'ble Supreme Court and contended that in the matters of taxation, Government/Parliament has wide latitude and the scope for judicial intervention is very limited.

² *Safari Retreats Private Limited vs. Chief Commissioner of CGST* 2019 (25) G.S.T.L. 341 (Ori.).

It was further argued that credit is available only in the situations when there is continuous taxable supply and that is the very object of the credit scheme whereas, in the situation in question, the credit claim is one stage anterior and hence the chain link gets automatically broken the moment cement, steel is used for construction of immovable property. Furthermore, it was contended that once a property crosses the stage of completion certificate, it becomes an immovable property and moves out of Article 246A and settles under Article 49, List 2 and therefore goes out of GST purview. Hence, it is not only barred under Statute but also as per Constitution.

In this regard, the Court held that restrictions under S.17(5)(d) are subject to two exceptions i.e. first, where goods or services or both are received by a taxable person to construct an immovable property consisting of a “plant or machinery”. Secondly, where goods and services or both are received by a taxable person for the construction of an immovable property made not on his own account and ITC is not restricted in the case of the said two exceptions. Further, However, when an immovable property is intended to be sold or given on lease or license then construction cannot be said to be on a taxable person’s “own account”. The Court also emphasized on the functionality test for deriving the meaning of the expression plant and machinery.

While making these observations the Court also made an important observation that the provisions of 17(5)(c) and (d) cannot be said to be discriminatory when the said restrictions have been brought with the objective of non-encroachment upon the State’s legislative powers under Entry 49 of List II i.e. to tax land and buildings. Thus, the restrictions pertaining to ITC were held to be valid by the Court but if any benefit is accruing to the taxpayer within the four corners of the law then the Court held that the same should be extended to the taxpayers.

VI. Whether ITC is a vested or an accrued right

While in Safari Retreat’s decision the Court opined that the benefit of ITC should be given when the provision provides for, it also held that restrictions can be placed upon ITC claims and legislature has power to do so. Thus, one cannot say that ITC claim is unconditional and absolute. Further ITC is also not a vested right as was sought to be projected in the erstwhile regime cases. As explained, Credit is available on input tax paid on inputs used by a person for its output supply. Thus, to ensure that such scheme is not misused by the taxpayers and there

is no revenue loss to the government, it becomes crucial to maintain control measures/restrictions. As per the tax laws, credit/setting-off is available to a taxpayer only after fulfillment of the conditions prescribed in the statute and the main point of litigation revolves around the point that whether the taxpayer has fulfilled mentioned conditions and that whether the taxpayer is not availing credit in extent of the restrictions imposed. Thus, credit as a scheme is available only on fulfillment of certain conditions.

Up until recent years, the Courts have taken the position that availability of credit is a vested right of the taxpayer. In other words, the benefit of credit vests or is accrued to the taxpayer as soon as it is established that the conditions mentioned in the statute.³

However, in recent times, the said position has shifted wherein, the Courts have held that ITC under GST laws is not a vested right of the taxpayer but merely a concession/benefit which is available to the taxpayer only on fulfillment of certain conditions and restrictions mentioned in Section 16 to 18 of the CGST Act. The Hon'ble Supreme Court in the case of *M/s TVS Motor Company Ltd. v. The State of Tamil Nadu & Ors.*⁴, wherein, the Hon'ble Apex Court held as follows:

“30. ...After discussing certain judgments of this Court and other High Courts, the High Court has observed that the legal position was that right to claim ITC is not a vested right or an indefeasible right. It is a benefit conferred under the Act in certain contingencies and subject to conditions prescribed in the statutory scheme. Therefore, it is open to the State Legislature to provide for conditions and restrictions while extending the concession. Likewise, it was also necessary for any assessee to claim input credit to fulfill those conditions.”

The said position has also been upheld by various Courts in GST regime.⁵ Thus, the notion that ITC is a vested right has been diluted under GST and there are divergent views as to whether the ITC is a vested right or merely an concession or benefit which is accrued to the taxpayer on fulfillment of the conditions/restrictions mentioned in the statute.

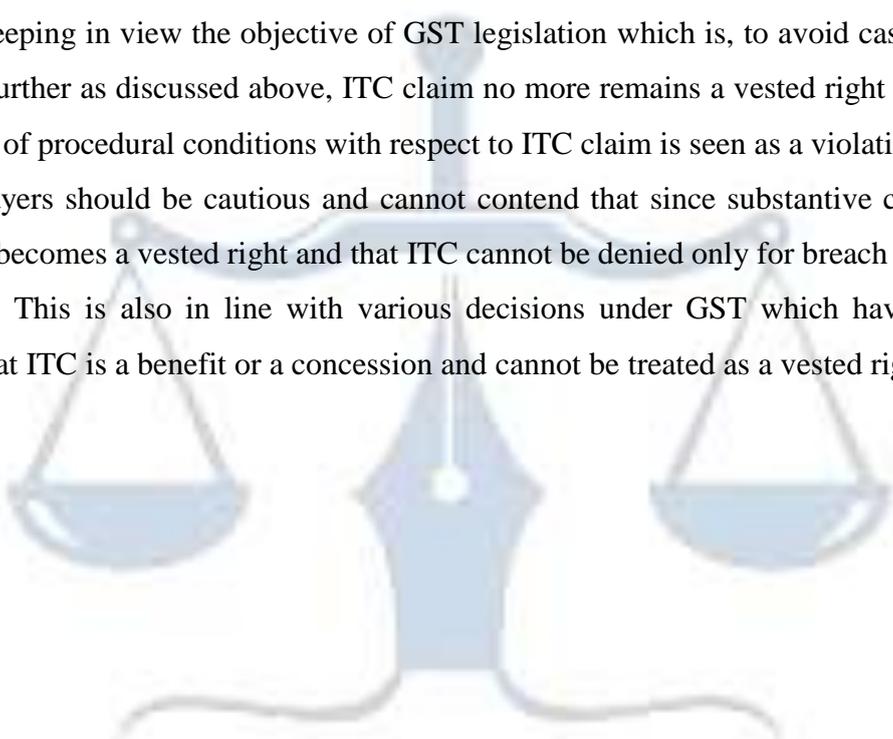
³ *Eicher Motors Ltd. vs. Union of India* 1999 (106) ELT 3 (S.C.) and *Commissioner of Central Excise, Pune v. Dai Ichi Karkaria Ltd.*, 1999 (112) ELT 353 (S.C.).

⁴ *M/s TVS Motor Company Ltd. v. The State of Tamil Nadu & Ors*, 2018 (18) G.S.T.L. 769 (S.C.).

⁵ *M/s. Siddharth Enterprises v. The Nodal Officer*, 2019 (9) TMI 319 and *M/s. BBA Infrastructure Ltd. v. Senior Joint Commissioner of State Tax & Ors* MAT No. 1099 of 2023.

VII. Conclusion

While the scheme of ITC under GST is intended to benefit the taxpayers and avoid cascading effect of taxes by providing set off of tax paid at input stage with the output stage tax liability. However, the law provides for certain conditions before such ITC can be availed such as receipt of goods, payment of taxes to the government, proper documentation on basis of which such ITC is claimed. Some of these are substantive conditions whereas few such conditions are procedural conditions. Once the substantive conditions are fulfilled, then the ITC should be allowed to the taxpayers and non-fulfillment of procedural condition should not lead to denial of claim keeping in view the objective of GST legislation which is, to avoid cascading effect of taxes. Further as discussed above, ITC claim no more remains a vested right and even non fulfillment of procedural conditions with respect to ITC claim is seen as a violation of law and thus, taxpayers should be cautious and cannot contend that since substantive conditions are fulfilled it becomes a vested right and that ITC cannot be denied only for breach of procedural conditions. This is also in line with various decisions under GST which have upheld the position that ITC is a benefit or a concession and cannot be treated as a vested right.



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