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UPDATE

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This Update has been prepared by Rajarshi Dasgupta.

Whether the condition prescribed vide Notification No. 03/2019 – Central Taxes (Rates) denying Input Tax Credit from 01.04.2019 to developers is opposed to law or not?

A. *Introduction*

One of the main objectives to replace erstwhile indirect taxes with GST was to reduce the cascading effect of various taxes and seamless flow of credit from one stage of value chain to the other stage so that the tax paid at the input stage does not become the cost and does not hamper the trade at large. This leads to taxation only of value addition. In Statement of Objects and Reasons attached with the Constitution (122nd Amendment) (GST) Bill, 2014, it is categorically mentioned that the goods and services tax shall replace a number of indirect taxes being levied by the Union and State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. Further, in the "statement of objects and reasons" issued along with the CGST Bill it was specifically stated that the tax system present prior to introduction of GST was facing the following difficulties.

a. Cascading of taxes as taxes levied by the Central Government are not available as set off against the taxes being levied by the State Government.
b. Certain taxes levied by the State Governments are not allowed as set off for payment of other taxes being levied by them

B. *Current legal position*

Accordingly, as per Section 16 of the Central Goods and Service Tax Act ("CGST Act"), every registered person, subject to such conditions and restrictions as may be prescribed, is 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 of furtherance of business.

The Central Government issued Notification No. 03/2019 – Central Tax (Rate) dated 29.03.2019 substituting the entry at Serial no. 3(i) with 3 (i) (ia), (ib), (ic), (id), (ie) and (if) along with entries of Column no. (3), (4) and (5) of the original notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, providing for new tax rates and the conditions. Relevant opening paragraph of the Notification no. 03/2019- CT(R) dated 29.03.2019 is extracted hereunder:

"In exercise of the powers conferred by sub-sections (1), (3) and (4) of section 9, sub- section (1) of section 11, sub-section (5) of section 15, sub-section (1) of section 16 and section 148 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No.11/2017- Central Tax (Rate), dated the 28thJune, 2017, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide number G.S.R. 690(E), dated the 28th June, 2017, namely:-"

In the above notification it was provided that the new rate of tax i.e., 3.5% Central Tax would apply only on fulfillment of conditions as mentioned in Column (5) against item (ia) of Serial no 3 of the Notification. To quote the conditions in the 1st and 2nd proviso of said item (ia) of Sr. No. 3:

"Provided that the central tax at the rate specified in column (4) shall be paid in cash, that is, by debiting the electronic cash ledger only;

Provided also that credit of input tax charged on goods and services used in supplying the service has not been taken except to the extent as prescribed in Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP;"

C. *Analysis & conclusion*

On a bare perusal of section 16(1) of the CGST Act it is evident that it is couched in very wide language. The opening words of the said provisions says every registered person, and the same is succeeded by the expression shall, and the provision goes on to provide that – "every registered person shall 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". However, the said provision also says that the right provided to every registered person shall be subject to such conditions and restrictions as may be prescribed. Thus, while there is a right granted by a statute to every registered person entitling him to take credit of input tax, the same may be circumscribed by the conditions and restrictions as may be prescribed.

In this regard, we would like to emphasize that, the power to provide for the "conditions and restrictions" is exercisable only by way of rules, as is evident from the definition of "prescribed" provided for in Section 2(87) of the as follows:

Section 2 (87) of the CGST Act defines the word "prescribed'' to mean prescribed by rules made under this Act, on the recommendations of the Council

That it is well settled that if the statute requires anything to be done in a particular way, it is to be done in that way and in no other way. Reference in this regard can be made to the decision of the Hon'ble Apex Court in the case of ***Bhavnagar University vs. Palitana Sugar Mill (P) Ltd and Ors (2003 (2) SCC 111)*** wherein the Hon'ble Supreme Court held as under:

"40. The statutory interdict of use and enjoyment of the property must be strictly construed. It is well-settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the Act are only creature of statute. They must act within the four-corners thereof." ***[Emphasis Supplied]***

It is important to note that in taxation laws, equitable considerations are entirely out of place, and one has to go strictly by the letter of the law. This has been well settled and long-established principle of taxation laws. In this regard, reference can be again made to the recent judgment of the Hon'ble Supreme Court in the case of ***Shabina Abraham vs. CCE & Customs (2015) 10 SCC 770*** wherein the Hon'ble Supreme Court held that:

> *"….. .Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the face of first principle when it comes to taxing statutes. It is therefore necessary to reiterate the law as it stands. In Partington v. A.G. (1869) LR 4 HL 100 at 122, Lord Cairns stated:*
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> *'If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute'."*

We also invite attention towards the judgment of the Hon'ble Patna High Court in the case of ***M/s Larsen and Toubro Ltd v The State of Bihar (2004) 134 STC 354***. In that case the section required that the deductions are to be given in the case of the works contract on the amount of labour or any other charges in the manner and to the extent prescribed. However, the rule made by the state of Bihar provided for deduction only of labour, and there was no rule providing for the manner and extent of the deduction for "any other charges". The Hon'ble Patna High Court referred to the definition of the word prescribed in the Act which was defined as prescribed by rules made under the Act. The Patna High Court observed that no state has the authority to go contrary to the law enacted by it and that no State/ Government can say that after providing a particular law it would not observe it. The Hon'ble High Court observed that every State is obliged to observe the laws made under the Constitution of India. After detailed deduction, since Rule 13A didn't provide for the requisite deduction which were to be provided by the way of rules vide Section 21(1), the High Court held that the Rules did not make Section 21(1) fully workable and hence held that assessment orders cannot be allowed to stand. The said judgment of the Hon'ble Patna High Court was affirmed by the Hon'ble Supreme Court in the case of ***State of Jharkhand v Voltas Ltd (2007) 7 VST 317 (SC)***. Thereafter said judgment was referred to with approval by the Hon'ble Apex Court in ***CCE vs. Larsen and Toubro 2016 (1) SCC 170*** wherein the Hon'ble Apex Court after referring to the previous judgment in **Shabina Abraham** (*supra)*, and after extracting the famous passage from ***Partington v. A.G. (1869) LR 4 HL 100***, again approved the ratio of the above referred judgment of the Patna High Court.

Here it would be relevant to refer to Chapter V of the Central Goods and Service Tax Rules, 2017 ("CGST Rules") which provide for the rules pertaining to ITC availment, restriction if any, and procedure of reversal thereof and on perusal of Rule 36 to Rule 45 of the CGST Rules, there is no such rule which prohibits taking and use of ITC as provided in the Notification No. 03/2019 - CT (R). On the basis of above, it is abundantly clear that the action of the Central Government/ State Government to provide for prohibition on taking ITC in respect of residential apartments etc. through issuance of notification is completely without authority of law and arbitrary.

Further reference can be made to Article 279A of the Constitution of India vide which GST Council has been constituted. It is important to note Article 279A(6), which provides that while discharging the

functions conferred by this article, the GST Council shall be guided by the need for a harmonized structure of goods and services tax and for the development of a harmonized national market for goods and services. One of the basic features of harmonized national market is seamless flow of ITC, and in our view, this forms the bedrock of the entire structure of GST law. The statement of objects and reasons which were noted while tabling the CGST Bill, as also the plain language of Section 16(1), which while granting the right is unequivocal as it is explicit from use of expressions every registered dealer shall be entitled. The expression subject to such conditions and restrictions as may be prescribed when read in the context in which it appears, to our mind do not contemplate complete prohibition or complete denial from taking the credit. Further reference can also be made to Section 17(5) of the CGST Act, which provides exhaustive list of cases in which input tax credit shall not be available (also referred to as blocked credits). There we specifically invite attention to clauses (c) and (d) of section 17(5) of the CGST Act which denies ITC of works contract services when supplied for construction of an immovable property except when it is used as an input service for further supply of works contract services, and of goods or services or both received by a taxable person for construction of an immovable property in his own account. Clearly both clauses (c) and (d) keeps the builders and developers out of the ambit of these blocked credit items. This shows the clear-cut scheme and mandate of the Act which runs through the provisions of ITC contained under CGST Act, that the parliament never contemplated denial of credit, even in respect of works contracts, and goods and services used in construction, when they are used by the builders – though the same is denied for all others. Thus, the statue unequivocally grants the benefit of ITC to the builders, and this grant by the parliamentary statute cannot be taken away or whittled down by the delegatee i.e., the Central Government by purported exercise under section 16(1) of the CGST Act.

Further, payment of every liability by a registered person as per his return can be made by debiting the electronic credit ledger or the electronic cash ledger. Hence, the Rule also does not put any restriction on the right of the taxpayer in relation to the mode of payment, rather provides that payment can be made by debiting either electronic credit ledger or electronic cash ledger. On the basis of the above, it can be said that condition putting restriction on the right of the taxpayer in relation to the mode of payment i.e., only through cash is ultra-vires the provisions of the CGST Act read with relevant Rules. It is pertinent to note that credit which is availed in accordance with law has been held to be a vested right which cannot be disturbed saved by authority of law. Credit is actually the tax paid by a registered person on his purchases and been treated to be equivalent to cash. This has been held by the Hon'ble Supreme Court in the case of ***Eicher Motors vs. Union of India 1999 106 ELT 3 SC***. In our view at this juncture, it could be profitable to refer to the nature of credit, as was succinctly elaborated by the Supreme Court in a locus classicus judgment in ***CCE vs. Dai Ichi Karkaria Ltd (1999) 112 ELT 353 SC***;

It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible and cannot lapse.

In view of the same, the Central Government while issuing the above-mentioned notification has completely violated the provisions of Section 16(1) of the CGST Act. Likewise, central government has

adopted the circuitous method to deny ITC, which has been statutorily kept out of the purview of blocked credit list contained in Section 17(5).
It is well settled law that what cannot be done directly cannot be done indirectly. Therefore, prohibition mentioned in Column (5) of serial no. 3 of the Notification No. 11/2017 – CT(R) as inserted by way of issuance of Notification No. 03/2019 CT(R) dated 29.03.2019 is ultra vires of the CGST Act and is also without jurisdiction, arbitrary, without authority of law, illegal, and issued in violation of the mandate of parent provisions.

Further, Notification no. 03/2019 – CT(R) dated 29.03.2019 is also in violation of Article 14 and 19(1)(g) of the Constitution of India for being arbitrarily passed and also for completely barring the developers to avail of their rightful credit and thereby making difficult of the developers to carry on their business. That the said Notifications singling out the developers and not allowing the ITC to them is manifestly arbitrary and is making a differential treatment to them without any basis and is hence violative of equality clause.

Therefore, the denial of input tax credit vide Notification no. 03/2019 – CT(R) dated 29.03.2019 is arbitrary, without authority of law and ultra vires the CGST Act and is violative of the fundamental rights prescribed in Article 14 and Article 19(1)(g) of the Constitution of India.

This Update has been prepared by Rajarshi Dasgupta who can be reached at rajarshi.dasgupta@aquilaw.com .