

# EY Tax Alert

Kerala HC holds 30 November time limit for claiming ITC applies retrospectively from 1 July 2017

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## Executive summary

This Tax Alert summarizes a recent judgement of the Kerala High Court (HC)<sup>1</sup> on the constitutional validity of Section 16(2)(c) and Section 16(4) of the Central Goods and Services Tax Act, 2017 (CGST Act).

While Section 16(2)(c) restricts input tax credit (ITC) in the hands of the recipient if the tax has not been paid by the supplier to the Government, Section 16(4) prescribes time limit for claiming ITC.

The key observations of the HC are as follows:

- ▶ ITC is a conditional entitlement subject to specific conditions and restrictions provided in Sections 16(2) to 16(4). Various HCs<sup>2</sup> have upheld the constitutional validity of the above provisions.
- ▶ The Government in order to resolve bonafide claims of ITC had issued Circulars<sup>3</sup> realizing the difficulty in the initial rollout of GST. Petitioners, who could not avail such benefits, may approach the appropriate GST authority within 30 days of the order.
- ▶ Vide Finance Act, 2022, Section 16(4) was amended to extend the time limit to claim ITC till 30 November of the next financial year. This procedural amendment was aimed to ease taxpayer difficulties and hence, has to be given retrospective effect.
- ▶ Accordingly, for the period from 1 July 2017 to 30 November 2022, if a person has furnished the return for the month of September till 30 November, their claim should also be considered.

Accordingly, HC upheld the constitutional validity of Section 16(2)(c) and 16(4) of CGST Act and concluded that the amendment in Section 16(4) should apply retrospectively.

<sup>1</sup> TS-343-HC(KER)-2024-GST

<sup>2</sup> MANU/BH/1034/2023, MANU/BH/1260/2023 and 2023 SCC Online AP 1476

<sup>3</sup> Circular Nos.183/15/2022-GST dated 27 December 2022 and 193/05/2023-GST dated 17 July 2023

## Background

- ▶ Section 16(2) of the Central Goods and Services Tax Act, 2017 (CGST Act) prescribes conditions to avail input tax credit (ITC).

As per Section 16(2)(c), ITC is not available if the tax charged in respect of a supply has not been paid to the Government by the supplier.

- ▶ Section 16(4) prescribes time limit for claiming ITC.

As per unamended Section 16(4) (*i.e.*, prior to 1 October 2022), the last date for claiming credit on invoices pertaining to a financial year was the due date for filing return for the month of September following the end of the said financial year or filing of the relevant annual return, whichever is earlier.

*Vide* Finance Act 2022, Section 16(4) was amended to extend the time limit to 30 November of the following financial year, or filing of the relevant annual return, whichever is earlier.

- ▶ Petitioners in the present case filed writ petition before the Kerala High Court (HC) challenging constitutional validity of Sections 16(2)(c) and 16(4) of the CGST Act.

## Petitioners' Contention

- ▶ Section 155 of the CGST Act mandates that the recipient of goods or services must substantiate the legitimacy of their claimed ITC.

If the recipient has in his possession, documents as mentioned in Rule 36 *i.e.*, valid tax invoice, proof of payment of value of goods along with GST component to the respective supplier and the actual receipt of goods, it should be considered that he has discharged the burden under Section 155.

The recipient cannot be burdened to ensure that the supplier of goods or services has paid the tax. Such a condition would be impossible for the recipient to comply with.

The maxim *lex non cogit ad impossibilia* means that law cannot compel a man to do anything which he cannot possibly perform. It is within the power of the State to collect and recover taxes and this duty cannot be passed on the recipient if the supplier does not pay the tax.

- ▶ Further, where Revenue is able to recover tax from supplier u/s 73 or 74, the same would lead to unjust enrichment in the hands of Government as on the same taxable transaction, it would collect tax from the recipient and also from the supplier along with interest and penalty.

Therefore, Section 16(2)(c) is violative of Article 19(1)(g) of the Constitution of India.

- ▶ The above provision also confers unchecked powers on the Revenue to treat *bona fide* and genuine purchasers and guilty purchasers alike which is violative of Article 14 of the Constitution.

- ▶ Claim of ITC is a right of the recipient and not a concession given by the taxing authorities under the statute. Denying credit due to default by the supplier would be violative of Article 300A of the Constitution.

- ▶ Moreover, Section 16(4) providing time limit to claim ITC is arbitrary and unreasonable.

The provision is a procedural provision and thus, substantive right of the taxpayer, *i.e.*, the claim of ITC, cannot be denied.

The main objective of the GST law was to avoid cascading effects on the supply chain of goods and services and ease the taxing administration. The provision of Section 16(4) runs contrary to the said objective of the legislation.

- ▶ *Vide* Finance Act, 2022, Section 16(4) was amended to provide 30 November of the next financial year as the due date for claiming credit.

The said amendment should be given retrospective effect as it is only a procedural aspect.

Due to the initial challenges of implementing GST, the revised Section 16(4) should be interpreted to have effect from 1 July 2017.

## Revenue's Contention

- ▶ Section 16 of the CGST Act and associated Rules provide conditions, restrictions, time limit and manner for availing ITC, which is a self-monitoring and self-policing provision.

If the supplier does not remit the tax collected from the buyer, it disrupts the tax chain, preventing the ITC from being granted since the State has not received the tax amount.

- ▶ The time limit for availing ITC cannot be said to be a restriction. The estimation of budgetary allocation has to be taken by the Central and State Governments every year and they are required to pass a budget.

There cannot be any uncertainty regarding tax collection, budgetary allocation and estimation of the Central and State Governments.

- ▶ ITC is not a right of a registered taxpayer, but it is a concession extended under the statute. A registered person cannot claim an entitlement to a credit as an absolute right.
- ▶ Section 155 casts a burden of proof in relation to the claim of ITC on the registered person. Section 16 is a code by itself which provides for entitlement as well as conditions to claim ITC.
- ▶ A law or statutory provision can be challenged only if it is proven to be arbitrary, unreasonable, beyond legislative authority, or infringing upon rights given in Part III of the Constitution.

- ▶ Patna HC in case of Astha Enterprises<sup>4</sup> has held that Section 16(2)(c) is constitutionally valid and the claim of ITC would be admissible only if the supplier pays the tax.
- ▶ Moreover, the constitutional validity of section 16(4) has been upheld in various HC decisions<sup>5</sup>.

## HC ruling

- ▶ ITC is a statutory benefit for a taxpayer, contingent upon meeting specific conditions and restrictions outlined in Sections 16(2) to 16(4) and Section 43 read with related CGST Rules.

Various courts<sup>6</sup> have determined that nature of a claim for credit is a concession or entitlement, which is not an absolute right and is subject to the conditions and restrictions as per the scheme of the legislation.

- ▶ Section 16 outlines the criteria, limitations, deadlines and procedures for claiming ITC, serving as a self-regulating mechanism.

In the past various High courts have upheld the constitutional validity of section 16(2) and 16(4) of the CGST Act.

Hence, the conditions and restriction given in Section 16(2) are not excessively burdensome or unconstitutional. Rather, they are necessary for the functioning of GST framework.

- ▶ However, in order to resolve all the *bona fide* claims and mistakes, the Government had issued Circulars realizing the difficulty in the initial rollout of GST and considering that GSTR-2A was not available initially.

The benefit of Circular No. 183/15/2022 dated 27 December 2022 and 193/05/2023 dated 17 July 2022 which cover the period from the introduction of GST till the introduction Section 16(2)(aa) can be taken in *bona fide* cases on submitting proof of payment of tax to the Government by the supplier.

- ▶ Petitioners who could not get the benefits of these Circulars and could not avail the benefits within the time limit prescribed, may approach the appropriate GST authority within a period of thirty days to avail the benefit of the aforesaid Circulars.

GST authorities will examine the claim of the individual recipients by applying the provisions of the Circulars and it will grant applicable relief to eligible taxpayers.

- ▶ Further, the amendment in Section 16(4) was aimed to ease taxpayer difficulties. Being procedural, it has to be given retrospective effect.

Therefore, for the period from 1 July 2017 to 30 November 2022, if a person has furnished the return for the month of September till 30 November, their claim should also be considered.

- ▶ Accordingly, HC upheld the constitutional validity of Section 16(2)(c) and 16(4) of the CGST Act and concluded that the amendment in Section 16(4) should apply retrospectively.

## Comments

- This ruling is likely to benefit taxpayers in contesting ITC denial where the same was claimed after 20 October but before 30 November of the following financial year.
- In the past, there are several HC rulings denying ITC where the same was claimed in September's return, but the said return was filed after the due date. The matter is currently pending before the Supreme Court.
- While the HC held that the revised time limit of 30 November applies retrospectively, it is relevant to note that it is restricted only in cases where September's return is filed till 30 November. Post amendment in section 16(4), credit can be claimed even in the October's return provided it is filed before 30 November.

<sup>4</sup> MANU/BH/1034/2023

<sup>5</sup> MANU/BH/1260/2023, 2023 SCC Online AP 1476

<sup>6</sup> (2016) 15 SCC 125, (2019) 13 SCC 225, (2022) 2 SCC 603, (2005) 2 SCC 129

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