

**Dichotomy of  
ITC Mismatch &  
Related Judicial  
Pronouncements**

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# Statutory Provisions and Rules

## Section 16(2) of the CGST Act, 2017

- Recipient having a tax invoice (of purchase), or debit note issued by the supplier
- Receipt of goods, services, or both
- **Tax charged by the supplier must be actually paid to the government.**
- Recipient has furnished its return under Section 39

## Rule 36 of the CGST Rules, 2017

- Documentary Requirements and conditions for claiming Input Tax Credit



# Judicial Pronouncements on Section 16

- D.Y. Beathel Enterprises v. State Tax Officer – Madras High Court
  - When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him.
- Chhattisgarh High Court in a W.P. Filed by Bharat Aluminium Company Limited has issued notice on similar grounds
- Under the Delhi VAT – Section 9(2)(g) – Many judgments on similar lines - Arise India



# Judicial Pronouncements on Section 16

- Calcutta High Court – LGW Industries Limited v. Union of India
  - Considering the submission of the parties and on perusal of records available, these writ petitions are disposed of by remanding these cases to the respondents concerned to consider afresh the cases of the petitioners on the issue of their entitlement of benefit of input tax credit in question by considering the documents which the petitioners want to rely in support of their claim of genuineness of the transactions in question and shall also consider as to whether payments on purchases in question along with GST were actually paid or not to the suppliers (RTP) and also to consider as to whether the transactions and purchases were made before or after the cancellation of registration of the suppliers and also consider as to compliance of statutory obligation by the petitioners in verification of identity of the suppliers (RTP).
  - **If it is found upon considering the relevant documents that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers and after taking into consideration the judgments of the Supreme Court and various High Courts which have been referred in this order and in that event the petitioners shall be given the benefit of input tax credit in question.**



# Bharti Airtel – SC decision

- **Delhi High Court** – *“The Respondents cannot defeat this statutory right of the Petitioner by putting in a fetter by way of the impugned circular. Since the Respondents could not operationalize the statutory forms envisaged under the Act, resulting in depriving the Petitioner to accurately reconcile its input tax credit, the Respondents cannot today deprive the Petitioner of the benefits that would have accrued in favour of the Petitioner, if , such forms would have been enforced. The Petitioner, therefore, cannot be denied the benefit due to the fault of the Respondents.”*
- **Supreme Court** - *A priori, despite such an express mechanism provided by Section 39(9) read with Rule 61, it was not open to the High Court to proceed on the assumption that the only remedy that can enable the assessee to enjoy the benefit of the seamless utilization of the input tax credit is by way of rectification of its return submitted in Form GSTR-3B for the relevant period in which the error had occurred - the assessee cannot be permitted to unilaterally carry out rectification of his returns submitted electronically in Form GSTR-3B, which inevitably would affect the obligations and liabilities of other stakeholders, because of the cascading effect in their electronic records.*







- Rule 36(4)
  - *“(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 20 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.”*
  - Details for invoices not uploaded by the Seller - The Recipient's credit is restricted to 20% of the credit available in respect of invoices matching in GSTR -2 A
  - *New Terminology introduced – “eligible credit”*

# Amendments to Rule 36(4)

W.e.f. 1 January 2020 – Reduced from 20% to 10%

1 Jan. 2020

1 Jan. 2021

W.e.f. 1 January 2021 – Reduced from 10% to 5%

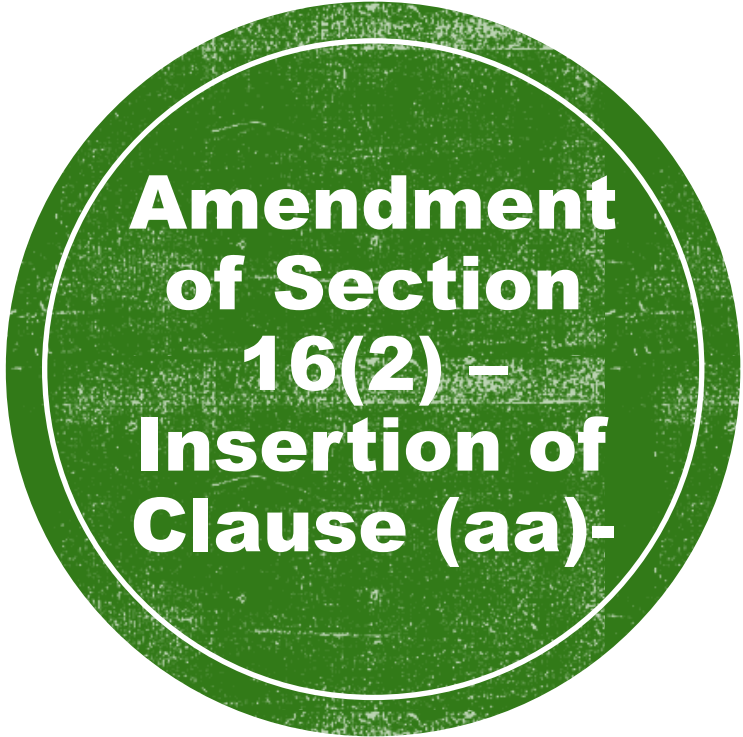




**Challenges to  
Constitutional  
Validity of Rule  
36(4)**

- Gujarat High Court – Surat mercantile Association v. Union of India
- Rajasthan High Court – GR Infraprojects v. Union of India
- Grounds:
  - No such condition in the substantive law
  - Doctrine of Impossibility
  - New Terms not defined in substantive law – Eligible Credit





**Amendment  
of Section  
16(2) –  
Insertion of  
Clause (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;***
- Inserted *vide* Finance Act 2021
- Notified only w.e.f. 01.01.2022
- The Insertion of clause (aa) was supposedly to give backing to the onerous condition of Rule 36(4)

# Clause 16(2)(aa) given effect to & simultaneous amendment of Rule 36(4)

While Clause 16(2)(aa) was inserted under Finance Act 2021, the same was only given effect from 01.01.2022.

Further, from 01.01.2022 – Rule 36(4) was also substituted with the new Rule as below:

- *(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under sub-section (1) of section 37 unless,-*
  - *(a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility; and*
  - *(b) the details of such invoices or debit notes have been communicated to the registered person in FORM GSTR-2B under sub-rule (7) of rule 60*



# Implication of Amendment to Rule 36(4)

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W.e.f. ITC is to be taken by the recipient only in cases where the details of invoices/debit notes are appearing in GSTR-2B/ 2A

ITC conditions made more stringent



S.No.	Period	Conditions
1	1 July 2017 – 8 October 2019	Fully allowed on Invoices Received and Booked on self declaration basis
2	8 October 2019 – 31 December 2019	ITC eligibility maximum of 120% of ITC reflecting in GSTR 2A
3	1 January 2020- 31 December 2020	ITC eligibility maximum of 110% of ITC reflecting in GSTR 2A
4	1 January 2021 – 31 December 2021	ITC eligibility maximum of 105% of ITC reflecting in GSTR 2B
5	1 January 2022 onwards till date	ITC eligibility only of ITC reflecting in GSTR 2B

# Journey of ITC – Since 2017 till date



# Rule 86A and blocking of Credit Ledger

- Rule 86 A – w.e.f. 26.12.2019 empowers Dept to disallow debit of ECL based on **reasonable belief** that ITC in ECL has been fraudulently availed or ineligible:
  - ITC has been taken on strength of docs issued by non-existent person without receipt of goods;
  - Tax has not been paid in respect of such supply;
  - ITC has been taken by non-existent person; and
  - Person taking ITC is not in possession of prescribed documents
- Constitutional Validity has been challenged – Realty Private Limited v. UOI (Calcutta High Court) and VIJ Engineers (P&H HC)
- Bombay High Court – Dee Vee Projects – Rule 86A is adequately framed
  - Dept to exercise power if: - (i) **Reasons to believe on basis of material before it** ; and (ii) Reasons are recorded in writing
  - HC has also held that **post decisional or remedial hearing** would have to be granted within **2 weeks**







**Intent of  
lawmakers  
vis-à-vis  
Approach of  
the executive**

- Para 18.3 of the minutes of 28th GST Council meeting held on 04.08.2018 in New Delhi which stated as follows:
  - *“18..... There would be no automatic reversal of input tax credit at the recipient's end where tax had not been paid by the supplier. Revenue administration shall first try to recover the tax from the seller and only in some exceptional circumstances like missing dealer, shell companies, closure of business by the supplier, the input tax credit shall be recovered from the recipient by following the due process of serving of notice and personal hearing. He stated that though this would be part of IT architecture, in the law there would continue to be a provision making the seller and the buyer jointly and severally responsible for the recovery of tax, which was not paid by the supplier but credit of which had been taken by the recipient. This would ensure that the security of credit was not diluted completely.”*
- Thereby, it was always the intention of the Legislature that in case of default by the supplier, the department shall first proceed against the supplier but not against the purchaser. However, practically they proceed against the purchasers



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