

## Rule 37A- Still a Chance for Taxpayers to Pass the Buck?

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*“The essence of law lies in the spirit, not its letter, for the letter is significant only as being the external manifestation of the intention that underlies it” – Salmond*

Over the last five years, the GST law has been amended several times, making the provisions for claiming Input Tax Credit (ITC) more stringent in light of countless debates with respect to ITC and its reconciliations, widespread bill trading fraud, etc. Given the provisions of Sec 16(2)(c), Sec 38, Sec 41, and others, it is critical for recipients to analyse vendors and their GST compliances in order to avoid missing any ITC.

Although GST Law is regarded as the foundation of the entire erstwhile “Value Added Tax” system, it appears that it has lost its essence as a result of the numerous limitations and controls that recipients has to impose on their vendors in order to ensure compliance. The different clauses of the GST law make it very apparent that it is the recipients’ responsibility to ensure that their suppliers comply with the provisions of law. The immediate article envelops indicative and not comprehensive list of checks and vigilance that should be used. The adage “Caveat Emptor,” which means “let the buyer beware,” is quite widely known and the Law appears to have stiffened it.

#### • Background

The Government while limiting the function of online matching to the auto-population of matched results in Form GSTR-2A/2B, eliminated the idea of provisional credit and accepting thereof. There is no longer a legal obligation for ITC to remain provisional as self-assessed in the return due to the introduction of Form GSTR-2B.

Accordingly, section 42, section 43, and corresponding rules 69 to 79 (except rule 78) stands removed w.e.f. 1st October 2022 from the statutory provisions. Law as originally drafted provided that ITC at first would be provisional in nature and it would become final pursuant to matching carried out on common portal in terms of section 42 or 43, as the case may be. However, with the abeyance and subsequent removal of GSTR 2, the government made GSTR 2A operational in September 2018 to provide taxpayers the details of the invoices uploaded by their suppliers.

**The substituted section 41 provides that recipient shall reverse the ITC along with interest in**

**respect of supplies whose tax is not paid by the corresponding supplier and shall re-avail the equivalent when the taxes are paid by said supplier in such manner as may be prescribed. This manner has been prescribed by way of inserting Rule 37A vide Central Tax Notification 26/2022 dated 26th December 2022.**

- **CBIC Notification 26/2022 dated 26th December 2022**

Recently, the Central Board of Indirect Taxes & Customs (CBIC) issued a Central Tax Notification 26/2022 dated 26th December 2022 notifying Central Goods and Services Tax (Fifth Amendment) Rules, 2022. One of the communiqués pertained to new insertion of Rule 37A discussing the reversal of ITC in the case of non-payment of tax by the supplier and re-availment thereof once the supplier has discharged the taxes.

The implications on plain reading of Rule 37A are as follows:

- Where recipient has availed ITC based on the details of invoice/debit note furnished by the supplier in his GSTR-1 or by using IFF who subsequently failed to file GSTR-3B for the said tax period by 30th September of the next financial year, then the ITC so availed is required to be reversed by the recipient in his GSTR-3B before 30th November of the next financial year.
- If the recipient fails to reverse the ITC in his GSTR-3B before 30th November of the next financial year, then such amount shall become payable by the recipient along with interest under Section 50.
- Where the supplier subsequently furnishes GSTR-3B for such tax period, then the recipient may re-avail the credit so reversed.

- **Validity of condition u/s 16(2)(c) r/w Section 41**

Sec. 16(2)(c) of the CGST Act, 2017 r/w Sec. 41(2) of the CGST Act, 2017 as substituted vide the Finance Act, 2022 and made material w.e.f. 01.10.2022 bestows upon the recipients to reverse self-assessed ITC where the tax has not been paid by the supplier. Presently Rule 37A has been embedded in CGST Rules, 2017 to endorse the way for such reversal and reavailment.

Acknowledging the modus operandi endorsed u/s 41, a definitive advantage to be delighted in by a recipient of ITC is exceptionally restricted. This is a result of the limitations forced on filing of form GSTR-1 by supplier that is to say, it can't be filed by such supplier if GSTR-1 or GSTR-3B for any of the past tax period is not filed and considering the recently added conditions (aa) and (ba) for privilege to ITC embedded in section 16(2) as of late. Because of these limitations and recently added conditions, the situation of availing ITC in regard of invoices whose taxes aren't paid by the corresponding supplier has actually been diminished to one particular tax period.

The new Rule 37A so inserted, hinges on the proposition that ITC reversal will be intrigued if GSTR 3B has not been filed by the vendor by 30th September of the next financial year and the reversal thereon shall be undertaken before 30th November. This rule ergo does not let anyone go scot-free thereby carrying all taxpayers in the same boat. Rule 37A carries specific lucidity to apply the "actual payment" condition for availment of ITC as given u/s 16(2)(c) r/w Sec. 41 of the Act. It very well might be worth bearing in mind that 30th November is the last date for undertaking revisions/corrections in the returns filed for the immediately preceding financial year.

It should be noted that first availment shall depend on filing of GSTR-1 by the supplier and the subsequent availment on filing of GSTR-3B by the supplier.

However, this edict does not cover within its ambit the eligibility of recipients' ITC where the supplier furnishes his GSTR-3B but neglects to release the tax liability in full as previously communicated in GSTR-1.

- **Legal Analysis - A Penny for your thoughts!**

GST Law has been widely known for its long saga of ever evolving ITC. The flow of credit under the regime has not been as seamless as it was expected. Input tax credit claim was originally envisioned to be based on the strength of invoices uploaded by the suppliers and available to the taxpayer in GSTR 2. Nonetheless, with the abeyance and ensuing removal of GSTR 2, the government made GSTR 2A operational in September 2018 to provide taxpayers the details of the invoices uploaded by their suppliers.

The requirement of filing GSTR 2 however was not operationalized in FY 2017-18 & 2018-19 and now stands removed from the statutory provisions.

The introduction of GSTR 2A attained significance from 9th October 2019 when Rule 36(4) became viable, and taxpayers henceforth were eligible to claim input tax credit as per the credit appearing in GSTR 2A.

However, from 1st January 2022 input tax credit claimed was restricted to those invoices which are filed by suppliers in their GSTR 1 & appearing in GSTR 2B, a new form introduced alongside GSTR 2A.

For these reasons, nota bene that Rule 37A works on the ground that Input Credit has been availed by the assessee on the reflection of invoice in GSTR-2B but GSTR 3B has not been filed by such supplier till the 30th of September following the end of financial year in respect of which ITC has been availed.

Further, the rule stands clear as far as interest calculation on ITC reversal is concerned. It may be noted that interest under Section 50 shall be payable if the reversal is done by the assessee after the 30th of November (belated reversal) whilst if same has been reversed on or before the 30th of November, then interest shall not be payable.

Nevertheless, there is no express provision of the dictum that permits the refund of the interest paid for reversal made even before 30th November 2022 if the vendor has eventually filed the pending GSTR 3B and consequently the recipient has re-availed the ITC so reversed.

The rule further brings to the light that the registered person may re-avail the ITC so reversed where the said supplier subsequently furnishes the requisite return GSTR-3B for the said tax period. Owing to Rule 37(4) which reads as below, one might say that there will be no time limits for the re-availment of the reversed ITC:

*“The time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier.”*

For this reason, one cannot lose sight of the fact that the recipient can re-claim or reavail the ITC despite the restrictions put under Section 16(4) of the CGST Act, 2017 as cited below:

*“A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the thirtieth day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier”*

### **Illustrations on aforesaid Rule**

The aforesaid Rule 37A can be better understood from the following situations giving a different perspective to the notion.

#### **1. Situation - I : Procedural Mechanism**

Supposing that vendor issues invoice in the month of February 2023 and furnishes the same in the GSTR-1 of February 2023. Howbeit, GSTR-3B has not been furnished by the vendor until 30th September 2023. Therefore, ITC Reversal is to be done by the recipient of invoice without interest on or before 30th November 2023.

Let's assume pending GSTR-3B is filed by supplier say in the month of January 2024. So, recipient is now permitted to avail pending ITC so reversed in the GSTR-3B for the month of January 2024.

## 2. Situation - II : Drafting Hiatus ??

Recently embedded Rule 37A provides that ITC is required to be reversed if return in Form GSTR-3B is not filed by the corresponding supplier till the 30th of September following the end of financial year in which the input tax credit in respect of such invoice or debit note has been availed.

It is to be perceived that if ITC pertaining to F.Y. 2022-23 is availed in F.Y. 2023-24, whether Rule 37A will be triggered on 30th September 2023 or 2024 as the expression used in the aforementioned rule reads as-

*" following the end of financial year in which the input tax credit in respect of such invoice or debit note **has been availed**"*

The similar analogy also appertains to reversal to be done on or before 30th of November accordingly.

The plain perusing of Rule 37A proposes that the ITC reversal on non-filing of GSTR 3B by the vendor for F.Y. 2022-23 ITC Invoice (availment done is F.Y. 2023-24) shall be attracted only if the said GSTR 3B is not filed by 30th September 2024 and not 30th September 2023.

Thus, this apparently seems like drafting lacuna in the abovementioned rule seeking further clarification or rectification by the lawmakers on this part.

Further, despite the fact the time limit is mentioned till 30th November, but the reversal has to be carried out in return furnished for the tax period October 2022 which is to be filed on 20th November (without late fee/interest) as far as regular monthly filers are concerned.

In case of the quarterly taxpayers, the date 20th November shall change to 25th November for payment to be processed by way of PMT-06 for the reversal specified under the discussed rule.

### • Concluding Comments

The essence of Rule 37A takes cognizance only when invoices or debit notes are furnished in Form GSTR-1 or through IFF by the corresponding suppliers but return in Form GSTR-3B is not filed. The Rule can prompt circumstances where because of monetary trouble the vendor may not have sufficient funds to pay the cash liabilities (remaining after nullifying ITC) leading to non-filing or late filing of GSTR 3B and thus leading to the reversal of the entire ITC by the recipients. Situations may also arise where company is undergoing IBC proceedings initiated by NCLT. Thusly, the courts and the judiciary might need to intervene and give the cure thinking about the brutality being referred to.

There may arise certain litigations to take place in future as there appears no end to long tunnel of ever evolving restrictions on ITC. Taxpayers may take a call of disputing the settled provision in cases where honest taxpayers are distressed. Though the government might justify the stance by stating that restrictions were in order to restrain the cases of fake Invoicing, justice to honest taxpayers cannot be ever denied. The bedrock of the Judicature rests on the wordings of preeminent English jurist William Blackstone who remarked -

***"Better that ten guilty persons escape, than that one innocent suffers."***