All India Federation of Tax Practitioner

(An Association of Advocates, Chartered Accountants & Tax Practitioners of India)

Regd. Office : 215, Rewa Chambers, 31, New Marine Lines, Mumbai 400 020.
Tel.: 022-22006342 / 43 / 49706343 | E-mail: aiftpho@gmail.com | Website: www.aiftponline.org

National President
ADV. D. K. GANDHI, Delhi
M: 9810216801
advocatedkgandhi@gmail.com

Deputy President
ADV. PANKAJ GHIYA
Jaipur
M: 9829013626
pankajghiyajaipur@gmail.com

Secretary General
CA. JAMUNA SHUKLA
Varanasi
M: 9450361366
cajamuna@gmail.com

Treasurer
CA. VIJAY KEWALRAMANI
Thane
M: 9820073165
info@kewalramani.in

INDIRECT TAX (GST) REPRESENTATION COMMITTEE

Chairman
ADV. MUKUL GUPTA
Ghaziabad
M: 9811023739
mukuladv@hotmail.com

Co-Chairman
CA. JANAK VAGHANI
Mumbai
M: 9324680306
janak.vaghani1@gmail.com

Co-Chairman
S. N. PRASAD, TP,
Bengaluru
M: 9980066380
snprasadandco@gmail.com

Conveno
ADV. VIKRAM C
Saharanp
M: 941223
rajbhawan@y

ADVISORS TO THE COMMITTEE

DR. ASHOK SARAF, SR. ADV., Guwahati
M: 9864020679
drashoksaraf@gmail.com

ADV. NIKITA R. BADHEKA, Mumbai
M: 9821037885
nikita.badheka@gmail.com

COMMITTEE MEMBERS

ADV. A. V. S. KRISHNA MOHAN, Nellore
CA. ARUN KUMAR AGARWAL, Kolkata
ADV. ARVIND KUMAR AGGARWAL, Ghaziabad
B. S. SEETHAPATHI RAO, T.P., Kakinada
CA. BHARAT SACHDEV, Thane
ADV. BRIJ GOPAL DAS, Varanasi
ADV. DEEPAK BAPAT, Mumbai
CA. DHARMENDRA SHRIVASTAVA, Kanpur
CA. (DR.) GAURAV GUPTA, New Delhi
HARESH CHHUGANI, T.P., Mumbai
ADV. JYOTI PODDAR, Ranchi
ADV. MANOJ AGARWAL, Rourkela
CA. MANOJ NAHATA, Guwahati
P. JOHN JACOB SINGH, TP, Kuzhithura
CA. RAGINEE GOYAL, Guwahati
ADV. RAJIV AGARWAL, Jamshedpur
ADV. RAMESH CHANDRA JENA, Bhubaneshwar
ADV. SACHIN SHARMA, Jammu
ADV. SAMSTAN DOLMA, Leh
ADV. SANDEEP GOYAL, Chandigarh
ADV. SANDEEP SHARMA, Ghaziabad
ADV. SUNIL TALREJA, Ulhasnagar
CA. TARUN KUMAR AGARWALLA, Bhubaneswar
CA. YASHASVI SHARMA, Jaipur

ETHICS EDUCATION EXCELLENCE

05th March, 2022

Before,
The Hon'ble Finance Minister,
Government of India
&
Chairperson, GST Council,
New Delhi,

Reg: **Request for Omission/Amendment of Section 16(4) of Central Goods and Service Act, 2017(Act') as the relevant provision has created hurdles in availing Input Tax Credit ('ITC') as well as resulting into the doctrine of Double Taxation**

Respected Madam,

Goods and Service Tax was introduced in India with effect from 01.07.2017. The main Rationale, Object and Reason behind its introduction was *seamless flow of credit without having any cascading effect*. But after the advent of GST Regime, lot of genuine concerns have also been evolved among the Assessees. One of the concern, pertains to provisions related to availment of Input Tax Credit ('ITC') which are creating hurdles instead of facilitation and ease of doing of business.

As per Statement of Objects & Reasons of the "The Constitution (One Hundred And Twenty-Second Amendment) Bill, 2014", the main intention behind was to remove cascading effects of taxes. The relevant extract is reproduced as under:

STATEMENT OF OBJECTS AND REASONS

The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes

being levied by the Union and the State Governments and

*and is intended to remove **cascading effect** of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax.*

(emphasis supplied)

After four years practical experience of GST implementation, lot of hurdles have evolved which is restricting the concept of seamless flow of Input Tax Credit. One of the provision is Section 16(4) of the Act which provides that ITC for a particular year is mandatorily required to be claimed by the due date of filing of the return for the month of September of the subsequent year or the filing of Annual Return whichever is earlier. In the event of failure to do so, such ITC would not be available to the Assessees which would constitute into the doctrine of Double Taxation.

The relevant extract of the problem creating provision is reproduced as under:

16. Eligibility and conditions for taking input tax credit.—

(4) 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 due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or [******]39 debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.

It is submitted that the provision of Section 16(4) of the Act is clearly not inconsonance with the rationale behind bringing The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014. In furtherance to it, Section 16(4) is arbitrary in nature as it would totally restrict the availment of genuine flow of credit due to minor procedural lapses which is totally in violation of Article 14, Article 19(1)(g) and Article 300A of the Constitution of India. Although the restriction is provided by the Law but it does not seems to be reasonable as there is no mechanism provided under the said provision by which Assessee could get even limited condonation or relief under the said Provision. The Provision straightaway denies credit in the case the time limit are not met even in spite of the fact that the circumstances were beyond the reasonable control of the taxpayer. GST was introduced in order to avoid cascading effect and not to promote it or enhance it. Denial of credit and forcing a payment twice was obviously not in the scheme of things when GST was conceptualised and ideally should not have been in the scheme of GST statute also.

It is relevant herein to state that wherever under the law, the limitation of time is provided and the assesse is not able to comply within the said time, then in accordance to the principle of natural justice there is always a procedure of filing condonation of delay as well. But in the present scenario no facilitation of condonation has been provided. Due to this provision, many genuine tax payers have to suffer a lot. The writ petitions challenging the *vires* of the same provision are already been pending before different High Courts which are as under:

a. Surat Mercantile Association v Union of India, [2021] 124 taxmann.com 342 (Gujarat)
b. Shri Kumaran Construction Co. v Union of India, [2021] 124 taxmann.com 291 (Jharkhand)

It is submitted that in the case of Siddharth Enterprise vs. the Nodal Officer, **[2019] 109 taxmann.com 62 (Gujarat),** it has been observed that procedure prescribed under Section 16 is not rationale and hence is violative of Article 14 of the Constitution of India. Further, it has been observed that the double taxation on the same subject matter is arbitrary and irrational. The relevant extract are as under:

> ***34.*** *Section 16 of the CGST Act allows the entitlement to take input tax credit in respect of the post-GST purchase of goods or services within return to be filed under Section 39 for the month of September following the end of financial year to such purchase or furnishing of the relevant annual return, whichever is earlier. Whereas, Rule 117 allows time-limit only up to 27th December 2017 to claim transitional credit on pre-GST purchases. Therefore, it is arbitrary and unreasonable to discriminate in terms of the time-limit to allow the availment of the input tax credit with respect to the purchase of goods and services made in pre-GST regime and post-GST regime. This discrimination does not have any rationale and, therefore, it is violative of Article 14 of the Constitution.*
>
> ***40.*** *The liability to pay GST on sale of stock carried forward from the previous tax regime without corresponding input tax credit would lead to double taxation on the same subject matter and, therefore, it is arbitrary and irrational.*

(emphasis supplied)

It is submitted that in the pre GST regime, Central Excise Rules, 1944 and Cenvat Credit Rules, 2004 provides restriction by way of time limit, but still Hon'ble High Courts have allowed the Credit. In the case of Bharat Heavy Electricals Ltd. V. CCE, 2016 (332) E.L.T. 411 pronounced by Hon'ble Madhya Pradesh High Court, it was observed as under:

> *3. …….It was the case of the Revenue that under Rule 57G(2), the manufacturer is required to file a declaration under Rule 57G(1) after obtaining the dated acknowledgement,* ***take credit of the duty paid on inputs received and in accordance to the second proviso to sub-rule, the manufacturer is restrained from taking credit after six months of the date of issuance of any documents specified.***
>
> *12. Accordingly, in the facts and circumstances of the case, we are of the considered view that when the assessee was entitled to avail the Modvat credit under Rule 57A, merely because of the time frame fixed in making the entries in Part-II of RG-23A, and only because of some error in making the entry, denial of the benefit cannot be permitted.*

In addition to the above, there are many Judgments of Hon'ble CESTAT wherein the condition of time limit was by-passed as Credit is a vested Right under Central Excise Rules, 1944 and Cenvat Credit Rules, 2004

It is submitted that in other Countries like Australia and Canada, the indirect tax law provides larger time limit for availing Credit which is 4 years, which is more reasonable in nature and to make the domestic market more competitive on the global platform, there shall be reasonable time limit as available to tax-payers in Australia and Canada.

It is submitted that the law prevailing in Australia could be accessed at https://www.legislation.gov.au/Details/C2014C00008 wherein following extract of **A New Tax System (Goods and Services Tax) Act 1999** is relevant:

> ***93-5 Time limit on entitlements to input tax credits***
>
> *(1) You cease to be entitled to an input tax credit for a *creditable acquisition to the extent that the input tax credit has not been taken into account, in an *assessment of a *net amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a *GST return for the tax period to which the input tax credit would be attributable under subsection 29-10(1) or (2).*
>
> *(2) This section has effect despite section 11-20 (which is about entitlement to input tax credits).*

Similarly, the relevant information pertaining to Canadian Laws could be accessed from https://www.canada.ca/en/revenueagency/services/tax/businesses/topics/gst-hst-businesses/complete-file-input-tax-credit.html#ddnt_clm_

In furtherance to the above, it is submitted that in Income Tax Act, 1961 if an assessee have delayed TDS payment then assesse have to pay late fees under Section 234E and penalty under Section 271 of the Income Tax Act, 1961. *But nowhere the claims has been barred under the said Law.* Reference is invited to the Judgment of CIT v M/s Abbott Agency, Ludhiana, I.T.A. No.206 of 2012 (O&M) pronounced by Hon'ble Punjab and Haryana High Court, wherein the Assessing Officer, issued a notice under Section 143 (2) of the Income Tax Act, 1961 and held that as the assessee has received TDS certificates in the financial year 2007-08, but has not disclosed money receipts in respect thereof, the assessee is liable to pay tax, penalty and interest. To which Assessee appealed to CIT(A) and have by allowing the appeal CIT(A) observed that *the entire confusion has arisen because of unusual delay in sanctioning the amounts due to the assessee on account of bumper prizes etc. pertaining to lottery schemes run in F.Y. 2005-06. It is seen that the TDS of 1,22,384/- has been duly claimed for assessment year 2006-07 though the same has been allowed at the time of final assessment u/s 143(3). In view of the above the action of the AO in concluding that the assessee had not shown the income pertaining to the TDS deducted is erroneous in the facts of the case. Due to this, the Hon'ble High Court observed as under:*

> *A perusal of the above extracts reveals that amounts received are duly reflected in account books for the relevant assessment years. The assessee having proved that TDS certificates, issued late, pertain to receipts reflected in the account books for assessment year 2006-07, the impugned orders, based upon a detailed appraisal of the account books are legal and valid.*

Similarly, in the present scenario if the claim is being filed afterwards or after the due date, then a penalty or provision or late fees would penalize the Assessee, but strictly barring the claim is infringement of the vested rights.

It is submitted that tax payer is legally entitled to the ITC as per 3rd proviso to subsection (2) of section 16 of the CGST Act. Therefore, the honest tax payer shall not be penalized for misdeeds of the vendor. It is submitted that amount of ITC which has been mandatory allowed as per the provisions of Section 16 sub-section (1), and provision of Section 16(4) is making a hurdle in availing of the legitimate Credit by way of procedural infirmities. The use of word 'shall' depicts

the intention of law that all the amounts pertaining to ITC are smoothly available to the registered recipient buyer on purchase of goods from another registered dealer on the basis of the 'Tax Invoice' issued by it under Section 31(1).

In addition to the above, it is submitted that Government is the biggest recipient of Goods and Services in the whole Country, therefore the transactions should be smooth and no payment hurdles shall be there. But in practice it has been seen that one of the biggest reason for delayed remittance of GST to the exchequer of the Government is the extra ordinary delays in payment/consideration from the Government itself. Being the largest Goods and Service recipient, the bureaucratic formalities shall be least and business friendly as many MSMEs suffered due to delayed payment in the guise of dispute by the Government itself. In such a case this leads to an even more bizzare case of Government increasing its revenue by deliberate delays in its payment to its vendors, which have negative impact on whole business cycle.

In furtherance to the above, reference is invited to the Judgment of **K.T. Plantation Pvt. Ltd. & Anr vs State of Karnataka, Civil Appeal No. 6520 of 2003**, wherein observations were made with regarding to Article 300A of the Constitution of India which is extracted as under:

> *110. Article 300A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression `Property' in Art.300A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law. This Court in State of W. B. & Others v. Vishnunarayan & Associates (P) Ltd & Another (2002) 4 SCC 134, while examining the provisions of the West Bengal Great Eastern Hotel (Acquisition of Undertaking) Act, 1980, held in the context of Article 300A that the State or executive offices cannot interfere with the right of others unless they can point out the specific provisions of law which authorises their rights. Article 300A, therefore, protects private property against executive action. But the question that looms large is as to what extent their rights will be protected when they are sought to be illegally deprived of their properties on the strength of a legislation. Further, it was also argued that the twin requirements of `public purpose' and `compensation' in case of deprivation of property are inherent and essential elements or ingredients, or "inseparable concomitants" of the power of eminent domain and, therefore, of entry 42, List III, as well and, hence, would apply when the validity of a statute is in question. On the other hand, it was the contention of the State that since the Constitution consciously omitted Article 19(1)(f), Articles 31(1) and 31(2), the intention of the Parliament was to do away the doctrine of eminent domain which highlights the principles of public purpose and compensation.*
>
> *117. Deprivation of property within the meaning of Art.300A, generally speaking, must take place for public purpose or public interest. The concept of eminent domain which applies when a person is deprived of his property postulates that the purpose must be primarily public and not primarily of private interest and merely incidentally beneficial to the public. Any law, which deprives a person of his private property for private interest, will be unlawful and unfair and undermines the rule of law and can be subjected to judicial review. But the question as to whether the purpose is primarily public or private, has to be decided by the legislature, which of course should be made known. The concept of public purpose has been given fairly expansive meaning which has to be justified upon the purpose and object of statute and the policy of the legislation. Public purpose is, therefore, a condition precedent, for invoking Article 300A.*

142. Let the message, therefore, be loud and clear, that rule of law exists in this country even when we interpret a statute, which has the blessings of Article 300A. Deprivation of property may also cause serious concern in the area of foreign investment, especially in the context of International Law and international investment agreements. Whenever, a foreign investor operates within the territory of a host country the investor and its properties are subject to the legislative control of the host country, along with the international treaties or agreements. Even, if the foreign investor has no fundamental right, let them know, that the rule of law prevails in this country.

On perusal of the above, it could be said that the Hon'ble Supreme Court have clearly interpreted that deprivation from property could only be for the public purpose and under the provision of Section 16(4) of the Act, the attempt made to deprive of the property in the form of ITC does not seem at all in any of the public purposes. Further, if Article 300A is not effective then deprivation of property could cause serious impact in economy as foreign investments could be get effected due to it. Similarly, where the amount of Credit is huge and that got stuck up due to the provision of Section 16(4) of the Act, then huge loss would have to be faced by the Assessees in which there could be foreign Companies as well. This all could also result into the dilution of the programme of "Make in India" and "Aatmanirbhar Bharat".

On basis of the above, it is submitted that Section 16(4) of the Act shall be omitted from the Act or the necessary amendments could be made in the form of late fees, penalty and interest as well as facilitation for making the application for condonation pertaining to delay in filing of prescribed returns, but depriving of Assessee from the whole ITC is not only detrimental for the Assessee but for Revenue as well as this could result into the adverse effect in economy of the country leading to closure of business if there would be no availment of adequate working capital.

We request your honour to kindly consider our very reasonable request so that actual formation of all the benches of GST Tribunal's must happen in our country and their working should be started in very near future.

With highest regards,
Yours faithfully,
For: All India Federation of Tax Practitioners

(Mukul Gupta) (Vikram Chawla)
Chairman Convener
Indirect Tax GST Representation Committee
Mob: 9811023739
mukulgupta@sharnamlegal.com