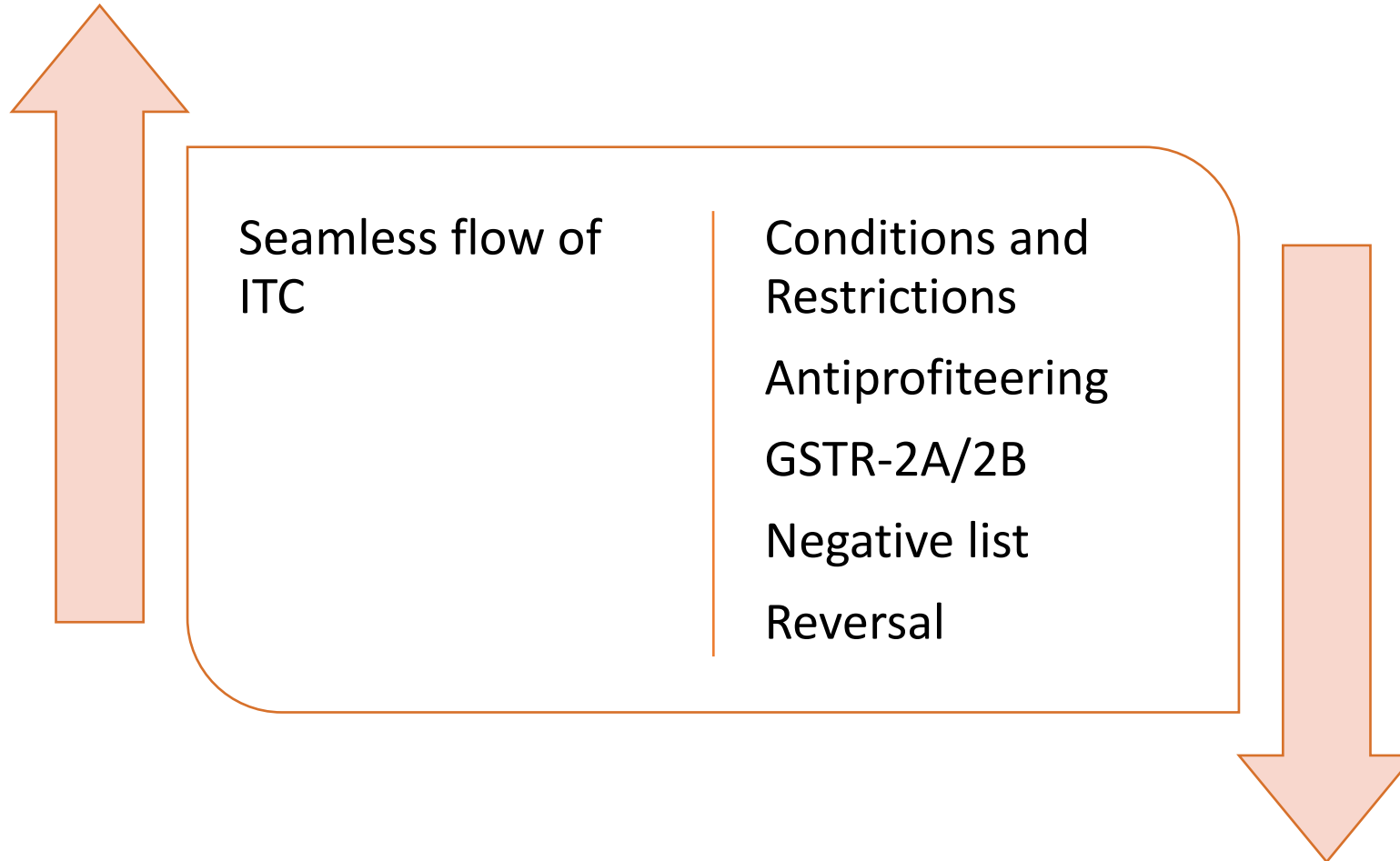


# Emerging Issues in ITC with Likely Solutions to mitigate the risk of litigation

**CA Vaishali B Kharde**

**(Founder and CEO Vaishali B Kharde and Company)**

# Expectation Vs Reality



## Key Sections

### SECTION 155. BURDEN OF PROOF



Section 16 - Eligibility and condition for taking input tax credit.



Section 17 - Apportionment of credit and blocked credits



Sec-18 - Availability of credit in special circumstances



## CGST ACT : SECTION 155. BURDEN OF PROOF

- *Where any person claims that he is **eligible for input tax credit** under this Act, the **burden** of proving such claim **shall lie on such person***

## Litigation Trend – With respect to ITC

ITC as per  
GSTR-2A VS  
availed in  
GSTR-3B

Cancellation of  
GST  
registration of  
the vendor  
retrospectively

Fake Invoices

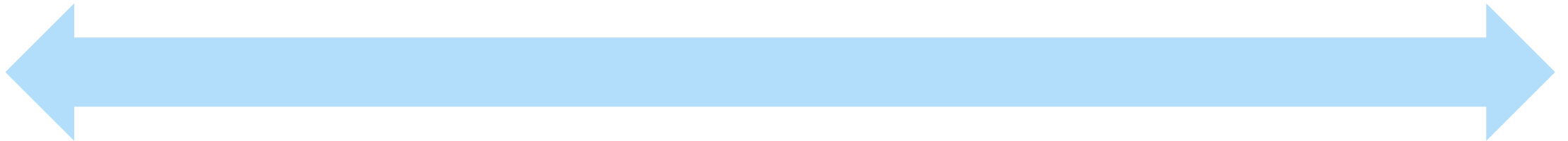
180 days

Ineligible ITC  
and Reversal of  
ITC



Clarifications w.r.t. availability of ITC not reflected in GSTR-2A

(Circular No. 183/15/2022-GST)

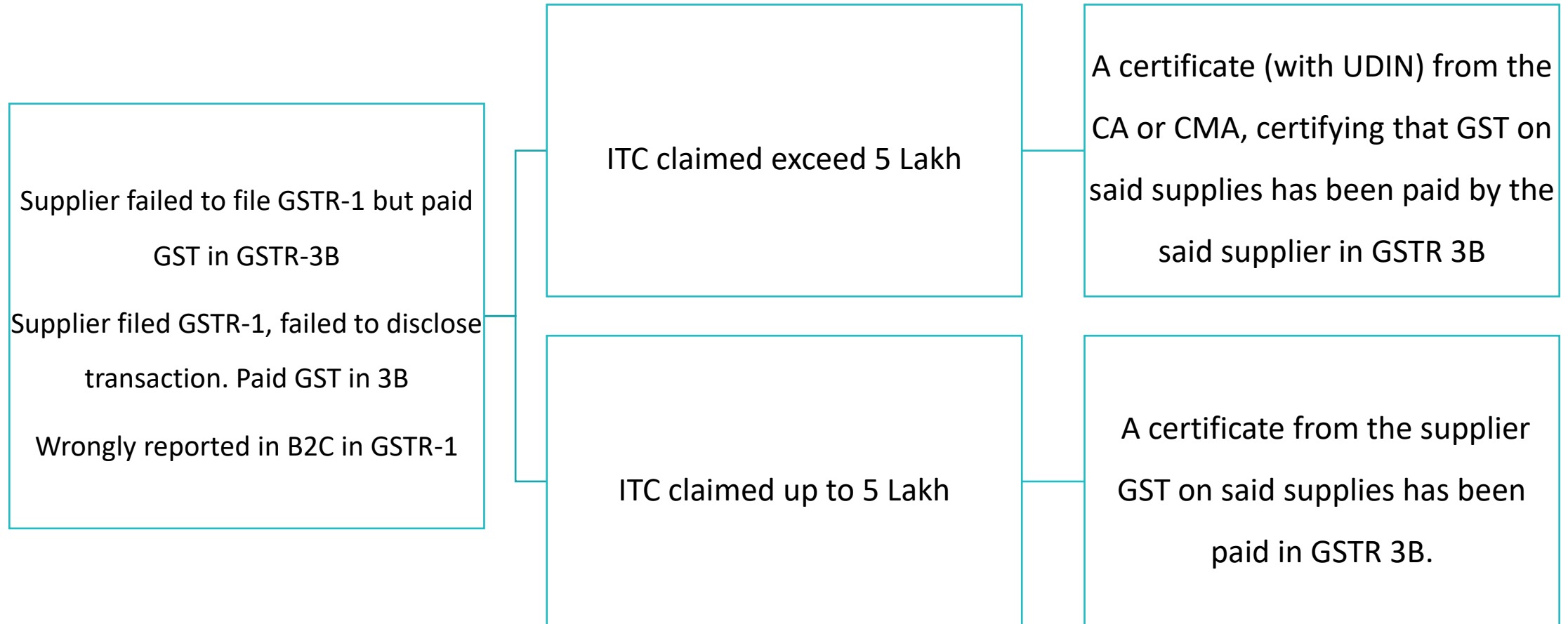


Clarifications w.r.t. availability of ITC not reflected in GSTR-2A

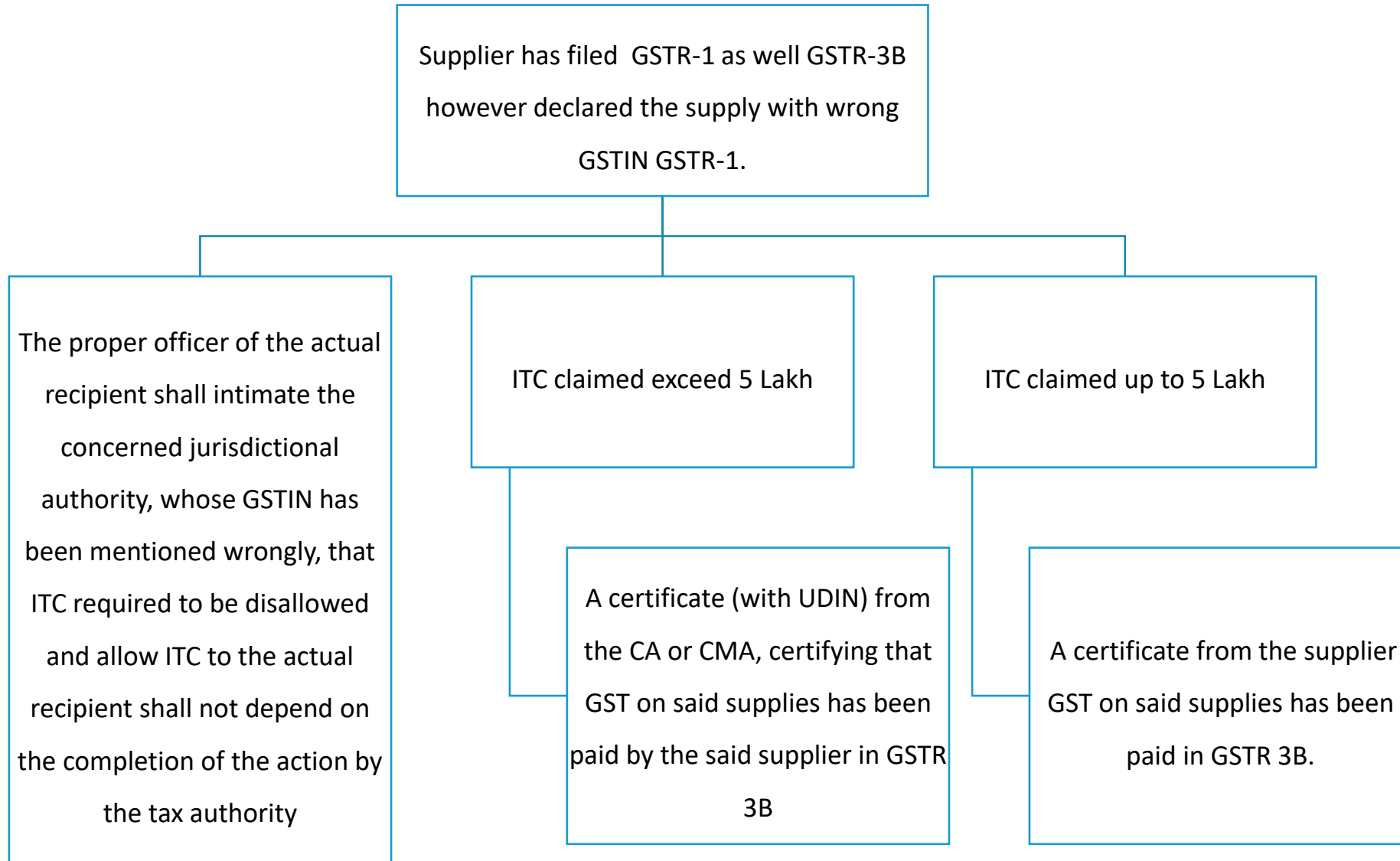
# Applicable for the period

- Financial years 2017-18 and 2018-19

# Clarifications w.r.t. availability of ITC not reflected in GSTR-2A



# Clarifications w.r.t. availability of ITC not reflected in GSTR-2A



CLARIFICATION  
TO DEAL WITH  
ITC AVAILED IN  
GSTR-3B VS GSTR-  
2A FOR FY 2019 TO  
FY 2021  
[CIRCULAR NO.  
193/05/2023-GST ]




## ITC availed in GSTR-3B VS GSTR-2A For FY 2019 to FY 2021

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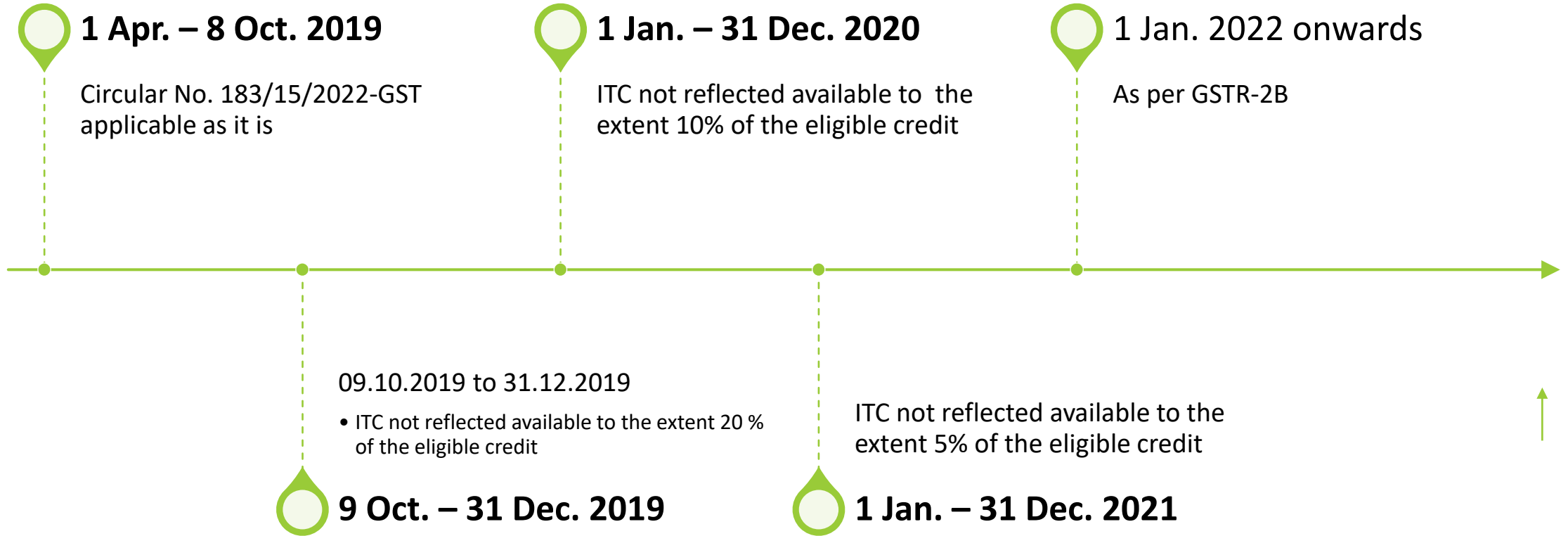
Circular No. 183/15/2022-GST dated 27.12.2022, vide which certificate is allowed for difference in ITC availed and GSTR-2A for FY 2017-18 and 2018-19 is applicable for for the period 01.04.2019 to 31.12.2021 subject to Rule 36(4) of the CGST Act

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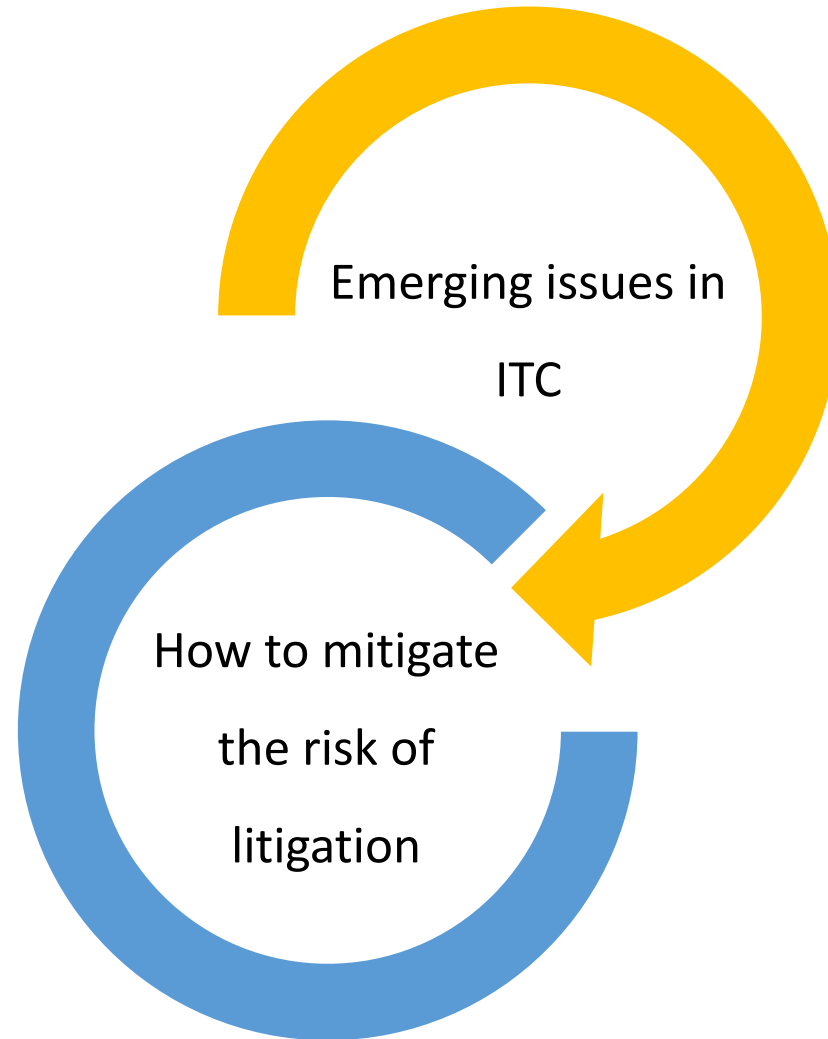
These instructions will apply only to the ongoing proceedings in scrutiny/ audit/ investigation, etc. for the period 01.04.2019 to 31.12.2021 and not to the completed proceedings.



# ITC availed in GSTR-3B VS GSTR-2A For FY 2019 to FY 2021



To discuss



'Entitlement to take credit of  
input tax charged'

## Questions

Whether credit is available for unregistered period?

What are the Conditions for entitlement to take credit ?

Whether ITC with respect tow or more GSTIN of same PAN required to maintain separately.

## Section 16 of the CGST Act

- *Eligibility and condition for taking input tax credit.*

*16. (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, 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.*

## Sec-18 - Availability of credit in special circumstances

- **18. (1) Subject to such conditions and restrictions as may be prescribed—**

*(a) a person who has applied for registration under this Act within thirty days from the date on which he becomes liable to registration and has been granted such registration shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of this Act;*

*(b) a person who takes registration under sub-section (3) of section 25 shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date of grant of registration;*

*(c) where any registered person ceases to pay tax under section 10, he shall be entitled to take credit of input tax in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the day immediately preceding the date from which he becomes liable to pay tax under section 9:*

*Provided that the credit on **capital goods shall be reduced by such percentage points as may be prescribed;***

## Key Highlights

Availability of ITC with respect to Services and Capital Goods for unregistered period

How to maintain the stock on the day immediately preceding the date from which taxpayer becomes liable to pay GST

## Key Highlights

*‘used or intended to be used  
in the course or furtherance  
of his business’*

## Section 16 (2) of the CGST Act

### ***Eligibility and condition for taking input tax credit.***

- *(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—*
  - *(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*
  - *(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;*

## Section 16 (2) of the CGST Act

*(b) he has received the goods or services or both.*

- **Explanation.**—*For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—*
- *(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;*
- *(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person*

*(ba) the details of input tax credit in respect of the said supply communicated to such registered person under [section 38](#)*

*has not been restricted*

## Section 16 (2) of the CGST Act

*(c) subject to the provisions of section 41 or ~~Section 43A~~, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and*

*(d) he has furnished the return under section 39:*

GSTR-2A/2B Vs ITC Availed

### Online Data Vs Books Vs Return

- GSTR-2A/2B Vs GSTR-3B
- ITC availed with GSTR 2A and/or GSTR-2B Vs Books
- Balance as per Electronic credit ledger with Books
- ITC register as per books Vs as per GSTR-3B and as per GSTR-2A/2B

## Overview



Whether 2A or 2B to refer?



What is the difference between 2A and 2B?

### July 2017 to September 2019

- ITC as per GSTR-2A is available (Although alternatively credit may be claimed as per books)

### October 2019 to December 2019

- ITC as per GSTR-2A and 20% of eligible ITC can be availed on provisional basis

### January 2020

- ITC as per GSTR-2A and 10% of eligible ITC can be availed on provisional basis

### February 2020 to March 2020

- ITC allowed as per books but applicability of 10% of eligible ITC deferred till August 2020

### February 2020 to December 2020

- ITC as per GSTR-2A and 10% of eligible ITC can be availed on provisional basis

### January 2021 to December 2021

- ITC as per GSTR-2A and 5% of eligible ITC can be availed on provisional basis

### January 22 onwards

- GSTR-2B

## Reason of difference

Invoices not  
uploaded in  
GSTR-1?

Invoices  
uploaded in  
GSTR-1,  
however GST on  
the same not  
paid

# Invoices not uploaded in GSTR-1?



# Amendment – Section 16 - Inserted

*“(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 (w.e.f. 1.01.2022 vide Notification No. 39/2021-C.T. by s. 109 of The Finance Act, 2021 (No. 13 of 2021)].

# Analysis of amendment

## One more condition for eligibility of ITC – Section 16(2)

- a. Possession of Tax Invoice or debit note
- aa. Detail of Invoice or debit note has been furnished by supplier in GSTR-1 and Communicated
- b. Goods or Services or both should be received.
- (ba) ITC communicated to such registered person under section 38 has not been restricted
- c. GST paid to the Government
- d. Furnished Return.

# Whether ITC is available? Scenario Analysis

Sr. No.	Vendor return filing status		Whether ITC Availed ?
	GST-1	GSTR-3B	
3.	Not Filed	Not filed	?

# Whether Credit with respect to GST not paid is available

Case Law

- AASTHA ENTERPRISES [2023 (77) G.S.T.L. 372 (Pat.)]

Issue

- Non Payment of GST by the supplier

Observations

- *For availment of input tax credit, its conditions are to be strictly followed failing which there can be no benefit conferred on purchasing dealer -*
- *Mere fact that there is a mode of recovery from selling dealer provided under statute would not absolve taxpayer from satisfy entire liability to Government and - Purchasing dealer being person who claims input tax credit could only claim input tax benefit if supplier who collected tax from purchaser has paid it to Government and not otherwise*

Invoices uploaded in GSTR-1,  
however GST on the same not paid



# Whether ITC is available? Scenario Analysis

Sr. No.	Vendor return filing status		Whether ITC Availed ?
	GST-1	GSTR-3B	
1.	Filed before <b><i>30th day of September of next FY</i></b>	Not filed	?
2.	Filed before <b><i>30th day of September of next FY</i></b>	Filed before <b><i>30th day of September of next FY</i></b>	?
4.	Filed before <b><i>30th day of September of next FY</i></b>	Filed after <b><i>30th day of September of next FY</i></b>	?
5.	Filed after <b><i>30th day of September of next FY</i></b>	Filed after <b><i>30th day of September of next FY</i></b>	?

**What is the Last date for availment of ITC for  
FY 2023-24**

### 3. Amendment in Section 16 (4)

At Present

- (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 debit note pertains or furnishing of the relevant annual return, whichever is earlier:

Amended Provision

- (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 due date of furnishing of the return under section 39 for the month of September following the end of financial year **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
- ***Substituted w.e.f. 1.10.2022 vide Notification No. 18/2022 - CT by s. 100 of The Finance Act 2022 (No. 6 of 2022)***

## Amendment in Section 41

Amendment

- Section 41 (1) and Section 41(2) substituted

Earlier

- *(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited **on a provisional basis** to his electronic credit ledger.*
- *(2) The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section.*

## Amendment in Section 41

Amended  
Section

- *(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to avail the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited ~~on a provisional basis~~ to his electronic credit ledger.*
- *(2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable **whereon has not been paid by the supplier, shall be reversed along with applicable interest**, by the said person in such manner as may be prescribed:*
- *Provided that where the **said supplier makes payment of the tax payable in respect of the aforesaid supplies, the said registered person may re-avail the amount of credit reversed by him in such manner as may be prescribed.***
- Substituted (w.e.f. 1st October, 2022 vide Notification No. 18/2022 - CT) by s. 106 of The Finance Act 2022 (No. 6 of 2022)



## Key Highlights

New section for section 41 of the CGST Act so as to do away with the concept of “claim” of eligible input tax credit on a “provisional” basis and to provide for availment of self-assessed input tax credit.

ITC claimed in monthly return would be considered as final ITC

ITC is liable to be reversed along with applicable interest if tax payable thereon has not been paid by the supplier.

ITC can be re-availed once the supplier pays the tax

## ITC reversal – Non Payment by Vendor

Insertion of Rule 37A



Reversal of input tax credit in the case of non-payment of tax  
by the supplier and reavailment thereof

# ITC reversal – New Rule 37A inserted

- **[Rule 37A. Reversal of input tax credit in the case of non-payment of tax by the supplier and re-availment thereof.-**
- *Where input tax credit has been availed by a registered person in the return in **FORM GSTR-3B** for a tax period in respect of such invoice or debit note, the details of which have been furnished by the supplier in the statement of outward supplies in **FORM GSTR-1** or using the invoice furnishing facility, but the return in **FORM GSTR-3B** for the tax period corresponding to the said statement of outward supplies has not been furnished by such supplier till the **30th day 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, the said amount of input tax credit shall be reversed by the said registered person, while furnishing a return in **FORM GSTR-3B** on or before the 30th day of November following the end of such financial year:*
- **Provided** *that where the said amount of input tax credit is not reversed by the registered person in a return in **FORM GSTR-3B** on or before the 30th day of November following the end of such financial year during which such input tax credit has been availed, such amount shall be payable by the said person along with interest thereon under **section 50**.*
- **Provided** *further that where the said supplier subsequently furnishes the return in **FORM GSTR-3B** for the said tax period, the said registered person may re-avail the amount of such credit in the return in **FORM GSTR-3B** for a tax period thereafter.]*

# ITC reversal – New Rule 37A inserted

Applicability-

- A Register Person avails ITC based on GSTR-1 filed by vendor however GSTR-3B has not been filed till the 30th day of September following the end of FY

Consequences

- the ITC is liable to be reversed on or before the 30th day of November following the end of such financial year and if not reversed same is payable with interest afterward

Reavailment

- where the said supplier subsequently furnishes the return in FORM GSTR-3B for the said tax period, the said registered person may re-avail the amount of such credit in the return in FORM GSTR-3B for a tax period thereafter.”

## Litigation – Future Trend – Even reflected in GSTR-2B -

GSTR-3B not filed

GSTR-3B filed in  
between 30<sup>th</sup>  
September to 30<sup>th</sup>  
November

System Generated  
notices of difference in  
ITC as per GSTR-2B and  
availed in GSTR-3B

# Legal Provision Analysis

## Section 16(2)(aa)

- Inserted w.e.f. 1.01.2022

## Section 16 (4)

- Substituted w.e.f.  
1.10.2022

## Section 41

- Substituted (w.e.f. 1st  
October, 2022

## Rule 37A

- Inserted via Notification  
dated 26th December, 2022

# Communication with Vendor

- ITC in books but not filed in GSTR-1
- Filed GSTR-1 but not paid GST in  
GSTR-3B

MECHANISM TO DEAL  
WITH DIFFERENCES IN  
ITC OF GSTR-2B AND 3B  
[Not. No. 38/2023- CT]



## Mechanism to deal with differences in ITC of GSTR-2B and 3B

A mechanism for system-based intimation to the taxpayers in respect of the excess availment of ITC in FORM GSTR-3B vis a vis that made available in FORM GSTR-2B above a certain threshold, along with the procedure of auto-compliance on the part of the taxpayers, to explain the reasons for the said difference or take remedial action in respect of such difference.

Rule 88D and FORM DRC-01C to be inserted in CGST Rules, 2017, along with an amendment in rule 59(6) of CGST Rules, 2017.

# Mechanism to deal with differences in ITC of GSTR-2B and 3B

The said registered person shall be intimated of such difference in Part A of FORM GST DRC-01C

The registered person either pay an amount or share reply within a period of seven days

In case of non payment or no explanation or explanation or reason furnished by such person is not found to be acceptable by the proper officer within the specified period shall be liable to be demanded in accordance with the provisions of section 73 or section 74



## ITC Mismatch (DRC-01C)

English ?

REF No. - AB270424885008X

Financial Year - 2024-25

Return Period - April

Status - Pending

### PART-A Intimation of difference in input tax credit available in auto-generated statement containing the details of input tax credit and that availed in return

1. It is noticed that the input tax credit availed by you in the return furnished in FORM GSTR-3B exceeds the amount of input tax credit available to you in accordance with the auto-generated statement containing the details of input tax credit made available to you in FORM GSTR-2B for the period **Apr 2024** by an amount of Rs. 25,61,383.72. The details thereof are as follows:

Form Type	Input tax credit available / availed (in Rs.)				
	IGST	CGST	SGST/UTGST	CESS	Total
FORM GSTR-2B	6,67,412.88	25,22,290.21	25,22,290.21	0.00	57,11,993.30
Form GSTR-3B	7,76,554.88	37,48,411.07	37,48,411.07	0.00	82,73,377.02
<b>Excess input tax credit availed</b>	<b>1,09,142.00</b>	<b>12,26,120.86</b>	<b>12,26,120.86</b>	<b>0.00</b>	<b>25,61,383.72</b>

2. In accordance with sub-rule (1) of rule 88D, you are hereby requested to either pay an amount equal to the said excess input tax credit, along with interest payable under section 50, through FORM GST DRC-03 and furnish the details thereof in Part-B of FORM GST DRC-01C, and/or furnish the reply in Part-B of FORM GST DRC-01C incorporating reasons in respect of that part of the excess input tax credit that has remained to be paid, within a period of seven days.

3. It may be noted that where any amount of the excess input tax credit remains to be paid after completion of a period of seven days and where no explanation or reason for the same is furnished by you or where the explanation or reason furnished by you is not found to be acceptable by the proper officer, the said amount shall be liable to be demanded in accordance with the provisions of section 73 or section 74 of the CGST Act, 2017, as the case may be.

4. This is a system generated notice and does not require signature.

**PART-B Reply by Taxpayer in respect of the intimation of difference in input tax credit**

**To add DRC-03, enter its ARN and press VALIDATE button.**

1. Paid the difference amount through DRC-03

Enter ARN of DRC-03

VALIDATE

CLICK HERE FOR DRC-03

S.No. 0	ARN of Form GST DRC-03	Tax Period	Paid Under Head	IGST (₹)	CGST (₹)	SGST/UTGST (₹)	CESS (₹)	

AND/OR

2. Select and explain the reason for difference

Input tax credit not availed in earlier tax period(s)...([Read more](#))

Explain reason here

Input tax credit not availed in earlier tax period(s) inadvertently or due to mistake or omission.

Explain reason here

ITC available on account of import of goods is not reflected in FORM GSTR-2B.

Explain reason here

ITC available on account of inward supplies from SEZ is not reflected in FORM GSTR-2B.

Explain reason here

Excess reversal of ITC in previous tax periods; the same being reclaimed in the current tax period.

Explain reason here

Recredit of ITC on payment made to supplier, in respect of ITC reversed as per rule 37 in earlier tax period.

Explain reason here

Top

Recredit of ITC on payment made to supplier, in respect of ITC reversed as per rule 37 in earlier tax period.

Explain reason here

Recredit of ITC on filing of return by the supplier, in respect of ITC reversed as per rule 37A in earlier tax period.

Explain reason here

FORM GSTR-3B filed with incorrect details and will be amended in next tax period (including typographical errors, wrong tax rates, etc.)

Explain reason here

Any other reasons (Please specify)

Explain reason here

### Upload supporting document (if any)

No file chosen

- i** Only PDF/JPG file format is allowed.
- i** Maximum file size for upload is 5MB.

I/ We, hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

The details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted – Section 16(2)(ba)

## Amendment – Section 16 - Inserted

*(ba) the details of input tax credit in respect of the said supply communicated to such registered person under **section 38 has not been restricted;** [Inserted (w.e.f. 1.10.2022 vide Notification No. 18/2022 - CT by s. 100 of The Finance Act 2022 (No. 6 of 2022)].*

# Insertion of Section 38

Amendment

- *Insertion of Section 38*

Amendments in Section 38

- *(1) The details of outward supplies furnished by the registered persons under sub-section (1) of section 37 and of such other supplies as may be prescribed, and an auto generated statement containing the details of input tax credit shall be made available electronically to the recipients of such supplies in such form and manner, within such time, and subject to such conditions and restrictions as may be prescribed.*
- (2) The auto-generated statement under subsection (1) shall consist
  - (a) details of inward supplies in respect of which credit of input tax may be available to the recipient; and

# Insertion of Section 38

Amendments in  
Section 38

- *(b) details of supplies in respect of which such credit cannot be availed, whether wholly or partly, by the recipient, on account of the details of the **said supplies** being furnished under sub-section (1) of section 37,—*
- *(i) by any registered person within such period of taking registration as may be prescribed; or*
- *(ii) by any registered person, who has defaulted in payment of tax and where such default has continued for such period as may be prescribed; or*
- *(iii) by any registered person, the output tax payable by whom in accordance with the statement of outward supplies furnished by him under the said subsection during such period, as may be prescribed, exceeds the output tax paid by him during the said period by such limit as may be prescribed; or*

## Insertion of Section 38

Amendment  
s in Section  
38

- *(iv) by any registered person who, during such period as may be prescribed, has availed credit of input tax of an amount that exceeds the credit that can be availed by him in accordance with clause*
  - *(a), by such limit as may be prescribed; or*
- *(v) by any registered person, who has defaulted in discharging his tax liability in accordance with the provisions of sub-section (12) of section 49 subject to such conditions and restrictions as may be prescribed; or*
- *(vi) by such other class of persons as may be prescribed.”*

## Key Highlights

### ITC is not available if

- For certain period if Supplier is newly registered. (Period to be prescribed)
- defaulted the tax payment for continuous period as prescribed in rules
- who has paid less GST in GSTR-3B than disclosed in GSTR-1
- who has availed ITC more than allowed limits under section 38(2)(a).
- who defaulted in complying mandatory payment of tax liability in cash if applicable
- Other conditions as may be prescribed in rules

## Way Forward

Vendor  
Communication

- Initiate vendor communication

Mismatch

- GSTR-1 filed by vendor Vs ITC reflected in 2B

Communication wrt

Section 38

- Newly registered vendor
- Who has paid less GST in GSTR-3B than disclosed in GSTR-1
- defaulted in complying mandatory payment of tax liability  
in cash if applicable

Goods and Services not received

## Industries which are mostly Investigation

Scrap

Copper wire

Plastic granules

Gold, Silver, Bullion

Garment

Automobile Industry

Automobile Industry

Paint and Sanitary fittings

# GST Authorities Using Radio Frequency Data to Detect Tax Evasion, Fraud



## Technology

- Detection of frauds with respect to movement of Goods
- E-way bills were integrated with the radio frequency identification (RFID) tags in January 2021.
- Thus, now cross-verifying the details of vehicle movement specified in the e-way bill with their physical movement will detect mismatches and accordingly will help to detect tax evasion and/or frauds related to fake invoices or firms

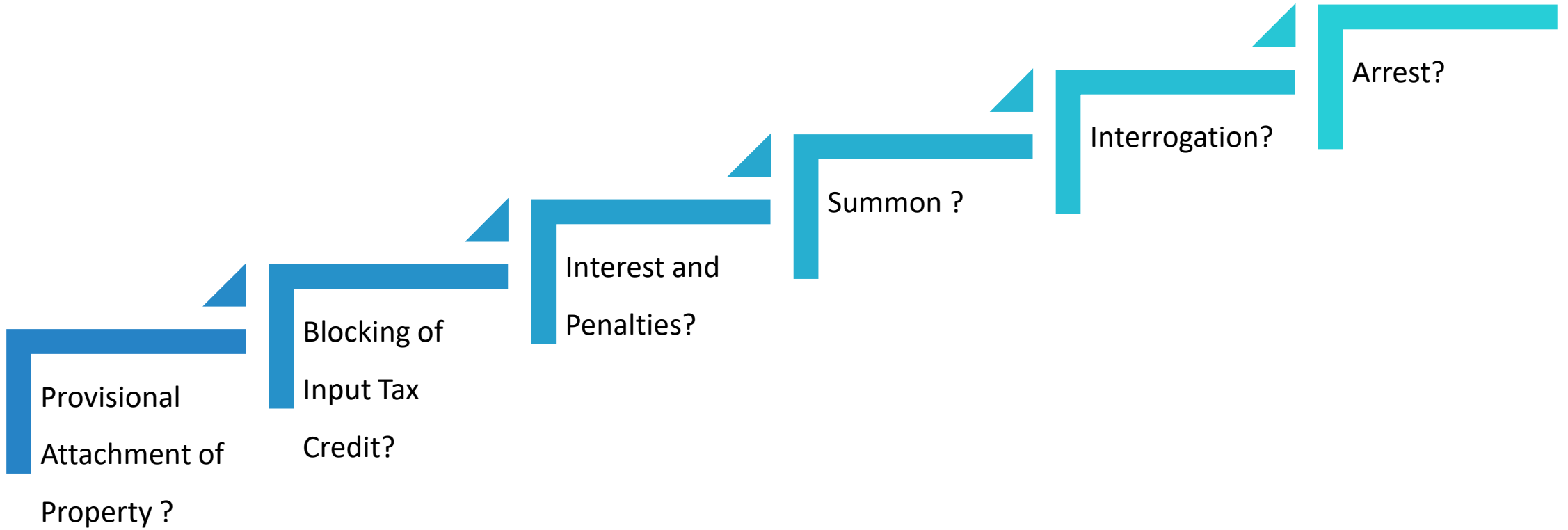
# GST Authorities Using Radio Frequency Data to Detect Tax Evasion, Fraud



## Technology

- Thus, now Authorities have started detecting instances of tax evasion and/or fraud by identifying mismatches between E-way bill issued for transporting goods and the data from radio frequency tags that commercial vehicles use to pass through toll plazas.

# Risk



Clarifications w.r.t. Fake Invoices

[Circular No. 171/03/2022-GST]

# Fake Invoices - Circular No. 171/03/2022-GS

A issue Invoice to B without supply – Action Against A

- No action u/s 73 and 74
- liable for penal action u/s 122 (1)(ii) of the CGST Act for issuing tax invoices without supply (ITC Passed on)

A issue Invoice to B without supply and B further used credit for outward supply – Action Against B

- Reversal of ITC along with interest u/s 50 and along with penal action u/s 74 of the CGST Act.
- No other penalty

# Fake Invoices - Circular No. 171/03/2022-GS

A issue Invoice to B without supply and B further used credit for GST against fake invoice – Action Against B

- No tax by B as no supply
- ITC ineligible to B u/a 16(2)(b)
- no demand and recovery of either ITC wrongly/ fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C' is required to be made from 'B' under the provisions of section 73 or section 74 of CGST Act.
- B' liable for penal action both under section 122(1)(ii) and section 122(1)(vii) of the CGST Act,

## Section 122 and 132: Penalty and Punishment

Section 122 - Penalty for certain offences.	Section 132 -Punishment for certain offences
<p>(1) Where a <b>taxable person</b> who—</p> <p>(i) supplies any goods or services or both <b>without issue of any invoice</b> or issues an <b>incorrect or false</b> invoice with regard to any such supply;</p> <p>(ii) <b>issues any invoice or bill without supply of goods</b> or services or both in violation of the provisions of this Act or the rules made thereunder;</p> <p>(vii) <b>takes or utilizes input tax credit without actual receipt of goods or services or both</b> either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;</p>	<p>(1) <del>Whoever commits any of the following offences</del> Whoever commits, or causes to commit and <b>retain the benefits arising out of, any of the following offences, namely:—</b></p> <p>(a) supplies any goods or services or both <b>without issue of any invoice</b>, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;</p> <p>(b) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;</p> <p><del>(c) avails input tax credit using such invoice or bill referred to in clause (b);</del></p> <p>“(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;</p>

## Section 122 and 132: Penalty and Punishment

Section 122 - Penalty for certain offences.	Section 132 -Punishment for certain offences
<p><i>(1A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an <b>amount equivalent to the tax evaded or input tax credit availed of or passed on.</b></i></p>	<p><i>((i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken <b>exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;</b></i></p> <p><i>(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds <b>two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;</b></i></p> <p><i>(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed <b>two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;</b></i></p> <p><i>(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.</i></p>

# GST Act Doesn't Empower the Authorities to Raise Demand During Investigation

Case

- M/S Deem Distributors Private [Writ Petition no. 7063 of 2021]

Issue

- Whether GST Act empower the Authorities to recover ITC availed on the basis of fake invoices during Investigation

Decision

- *Accordingly, the Writ Petition is allowed; the respondents are restrained from coercing the petitioner to make any payment without issuing notice under Section 74(1) of the Act and following the procedure therein; and they are directed to refund Rs.35,00,000/-already paid by petitioner with interest @ 7% p.a from the date of payment till date of refund within four (04) weeks from the date of receipt of a copy of this order.*



# GST Act Doesn't Empower the Authorities to Raise Demand During Investigation

Legal Provision

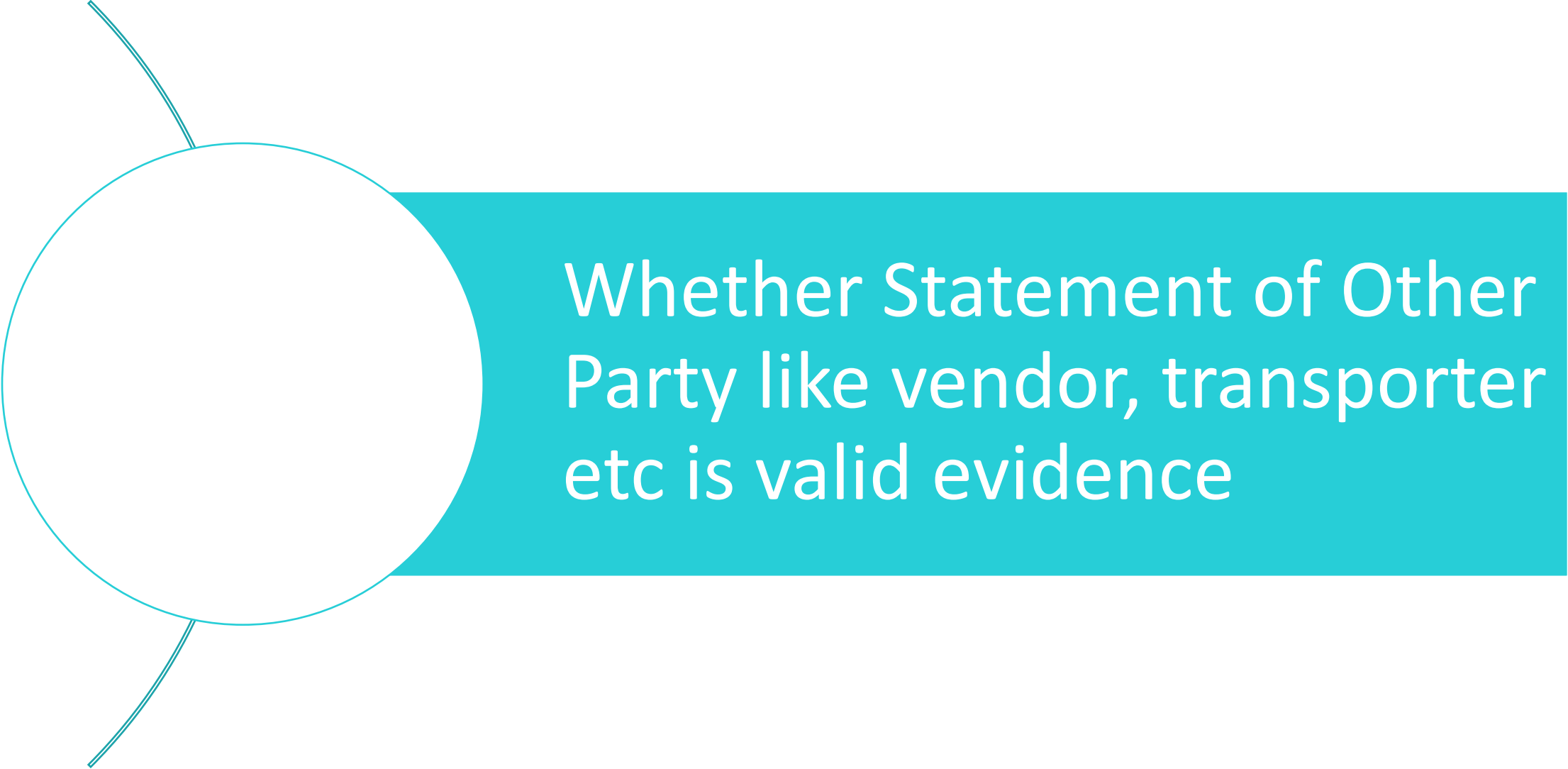
- As per Section 74 (1) of the Act the proper officer may issue a Notice if ITC has been wrongly availed or utilized by reason of fraud, or any wilful-misstatement or suppression of facts requiring to show cause as to why GST should not payable along with interest under Section 50 and a penalty equivalent to the tax specified in the notice.
- Section 74(5) of the Act enables the taxpayer before service of SCN to pay GST along with interest and a penalty of 15%.
- Section 74 (9) of the Act enables the proper officer to determine the amount of GST, interest and penalty and issue an order.



## GST Act Doesn't Empower the Authorities to Raise Demand During Investigation

Observation

- Section 74 (5) of the Act gives a choice to the tax payer to make any payment, if he is so chooses, but it does not confer any power to the Authorities to make a demand along with interest and penalty.
- No GST demand can be raised when investigation is in progress. GST Act does not empower the Authorities to put the cart before the horse and collect any tax, interest or penalty before they determine and without jurisdiction.



Whether Statement of Other Party like vendor, transporter etc is valid evidence

# Statement of Transporter

Case

- GARIMA ENTERPRISES (P) LTD. 2005 (182) E.L.T. 106 (Tri. - Del.)

Observations

- *The entire case of the Department is mainly based on the statement of Shri R.K. Gupta, proprietor of M/s. R.K. Enterprises and dealer of appellant. The statement reveals that besides issuing bogus modvatable invoices, he was also issuing genuine **invoices where the goods were actually supplied to the customers. This statement nowhere specifically mentions that the invoices issued in the name of the appellants were bogus.***

## Statement of Transporter

Observations



- *The statement of Shri R.K. Gupta reveals that besides issuing bogus modvatable invoices, he was also issuing genuine invoices where the goods were actually supplied to the customers. The learned Advocate **has rightly contended that the said statement is very general and nowhere specifically mentions that the invoices issued in the name of the Appellants were bogus.** The Revenue has also not rebutted the submissions made by the Appellants that they had never received any invoice for more than 6 tons and as such even as per the statement of Shri R.K. Gupta, the supply to the Appellants were not bogus. The Revenue has also not controverted the contention of the Appellants that they were sending the copper rods to their job workers for conversion and paying the conversion charges to the job worker. The Revenue has thus not succeeded in establishing that the Appellants did not receive the raw materials and received only modvatable invoices. Accordingly, we set aside the impugned Order and allow both the appeals*

# Statement of Vendor

Case

- MOTABHAI IRON & STEEL INDUSTRIES [2014 (302) E.L.T. 69 (Tri. - Ahmd.)]

Observations

*I find that the demand of Rs. 14,42,177/- is on the basis of statement of **consignor of goods that he has received only invoices from M/s. Vasmin Corporation, Bhavnagar** without physical receipt of M.S. Scrap and on the strength of such bogus invoices, he has passed on the Cenvat credit to the Appellant unit. Reliance has also been placed upon the statements of some of the driver/transporters whose vehicle number was mentioned on the weighment slip and who denied transported any goods to the Appellant unit. However, I find that only on this basis the credit cannot be disallowed to the Appellant unit. Apart from the statement of Shri Arjandas and some of the transporter **nothing has been brought on record to show that the goods were not received by the Appellant***

# Statement of Vendor

## Observations

- However, I find that only **the statement of administrator of truck and octroi receipt the receipt of goods cannot be disputed**. I find that the goods were consigned by the ship breakers and no investigation was conducted at their end to ascertain the fact of delivery of goods. Hence no demand can be made against the Appellant. Moreover the partners of the firm who are said to have actually received the goods were summoned for cross-examination, but they did not appear, in such case their statements cannot be relied upon. The goods were found to be duly shown as received and entered in the factory of the Appellant. **The statutory records of the Appellant concern show the receipt and consumption of the goods.** Pertinently it is noted that there is no statement of the supplier that the goods were not supplied to the assessee and were supplied to the said third parties. Neither there is any evidence that the said third parties have made any payment to the supplier of the goods. I therefore find no reason to disallow credit of Rs. 5,42,938/- to the Appellant.

## Our Comment

- Thus, no demand can be confirmed only on basis of statements by third parties when no evidence to support such statements

ITC availed after the due date of  
September

## Legal Provisions – Section 16(4)

- *(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 thirtieth day of November following the end of financial year to which such invoice or invoice relating to such 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.*
- Substituted w.e.f. 1.10.2022

## Legal Precedence

Judgement

- GOBINDA CONSTRUCTION [2023 (77) G.S.T.L. 483 (Pat.)]

Issue

- Constitutional validity of Section 16(4) of the CGST Act

Observations

- *Upon close reading of sub-section (1) of Section 16 of the CGST/BGST Act, we are of the view that the provision under sub-section (4) of Section 16 is one of the conditions which makes a registered person entitled to take ITC and by no means sub-section (4) can be said to be violative of Article 300A of the Constitution of India.*

## Legal Precedence

Observations

- *we are of the considered opinion that sub-section (4) of Section 16 of the CGST/BGST Act are constitutionally valid and are not violative of Articles 19(1)(g) and Article 300A of the Constitution of India. The said provision is not inconsistent with or in derogation of any of the fundamental right guaranteed under the Constitution of India.*

# Legal Precedence

Judgement

- THIRUMALAKONDA PLYWOODS [2023 (76) G.S.T.L. 172 (A.P.)]

Issue

- Constitutional validity of Section 16(4) of the CGST Act

Observations

- *ITC is a mere concession/rebate/benefit, and not a statutory or constitutional right and, therefore, imposing conditions including time limitation for availing said concession will not amount to violation of constitution or any statute - Secondly, operative spheres of Section 16 of CGST Act, 2017 and constitutional provisions under Articles 14, 19(1)(g) and 300A of Constitution of India are different and, hence, infringement does not arise.*

## Legal Precedence

### Observations

- *By nature ITC is a concession/rebate/benefit and not a statutory right which has been reiterated in a thicket of Apex Court decisions - Thus, time-limit prescribed for claiming ITC under Section 16(4) of APGST Act/CGST Act, 2017 is not violative of Articles 14, 19(1)(g) and 300A of Constitution of India - Section 16 of Central Goods and Services Tax Act, 2017 - Section 16 of Andhra Pradesh Goods and Services Tax Act, 2017 - Articles 14, 19(1)(g) and 300A of Constitution of India*

## Whether GSTR-3B is return

### Section 39 -Furnishing of returns

Sub section (1), (2) and (7) substituted. notified with effect from 10-11-2020

[\(NT-81/2020-CT\)](#)- [NT-01/2020-CT](#)

### Rule 61 - Form and manner of furnishing of return

- Amended With effect from 01-01-2021 so that to prescribe 3B as return.

# Legal Precedence

Judgement

- AAP AND CO. [2019 (26) G.S.T.L. 481 (Guj.)]

Issue

- impugned press release dated 18th October, 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 is the last date for the filing of return in Form GSTR-3B.

Observations

- *Section 39(1) of the CGST/GGST Act provides that every taxpayer, except a few special categories of persons, shall furnish a monthly return in such form and manner as may be prescribed. Rule 61 of the CGST Rules/GGST Rules prescribes the form and manner of submission of monthly return. Sub-rule 1 of Rule 61 of the CGST Rules/GGST Rules provides that the return required to be filed in terms of Section 39(1) of the CGST/GGST Act is to be furnished in Form GSTR-3.*

# Legal Precedence

## Observations

- ***The return in Form GSTR-3B is only a temporary stop gap arrangement till due date of filing the return in Form GSTR-3 is notified.*** Notifications are being issued from time to time extending the due date of filing of the return in Form GST- 3, i.e. return required to be filed under Section 39 of the CGST Act/GGST Act. It was notified vide Notification No. 44/2018-Central Tax, dated 10th September, 2018 that the due date of filing the return under Section 39 of the Act, for the months of July, 2017 to March, 2019 shall be subsequently notified in the Official Gazette.
- *It would also be apposite to point out that the Notification No. 10/2017-Central Tax, dated 28th June, 2017 which introduced mandatory filing of the return in Form GSTR-3B stated that it is a return in lieu of Form GSTR-3. However, the Government, on realising its mistake that the return in Form GSTR-3B is not intended to be in lieu of Form GSTR-3, rectified its mistake retrospectively vide Notification No. 17/2017-Central Tax, dated 27th July, 2017 and omitted the reference to return in Form GSTR-3B being return in lieu of Form GSTR-3.*

## Legal Precedence

### Observations

- *Thus, in view of the above, the impugned press release dated 18th October, 2018 could be said to be illegal to the extent that its para-3 purports to clarify that the last date for availing input tax credit relating to the invoices issued during the period from July, 2017 to March, 2018 is the last date for the filing of return in Form GSTR-3B.*

# Credit should not be denied

---

## Legal provision

A registered person '*shall not be entitled take input tax credit in respect of invoice*', after the due date of furnishing of '*return under section 39*' for the month of September following the end of financial year or furnishing of Annual return, whichever is earlier (Section 16 (4) of CGST Act)

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## Issue

Aforesaid provision is being interpreted by Authorities to mean that credit is available only if the returns are filed upto the due date of September of Next FY.

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# Credit should not be denied

## Why ITC should be available?

- Portal does not allow to file GSTR-3B Payable
- Even otherwise, if the returns were filed in time then the Government would have received GST only to the extent of cash amount from the taxpayer and thus, only **procedural delay** of filing of returns should not saddle additional liability

# Credit should not be denied

## Why ITC should be available?

- It is a settled legal principle that **procedural lapse** cannot take away substantive right to claim ITC
- Further, **Article 300A** of Constitution of India no person shall be deprived of his property save by authority of law
- Even otherwise section 16 (4) of CGST Act uses the terminology '***return under section 39***' and in the case of AAP & Co. it has been upheld that GSTR-3B is not a return (although Rule 61 is amended subsequently)

180 days

## Legal Provisions – Section 16(2) 2<sup>nd</sup> Proviso

- *Provided further that where a recipient **fails to pay to the supplier** of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be ~~added to his output tax liability, along with interest thereon~~ **paid by him along with interest payable under section 50**, in such manner as may be prescribed:*

Replaces words in second proviso to Section 16(2) - “added to his output tax liability, along with interest thereon”, the words and figures “paid by him along with interest payable under section 50” shall be substituted. [[Amendment Act -](#)

[FA 2023. NT-48/2023-CT](#) - Appoints 01-10-2023 as effective date for CGST Amendment Act 2023]

## Legal Provisions – Section 16(2) 2<sup>nd</sup> Proviso

- Provided also that the recipient shall be entitled to avail of the credit of input tax on payment ~~made by him~~ **to the supplier** of the amount towards the value of supply of goods or services or both along with tax payable thereon.
- in the third proviso, after the words “made by him”, the words “to the supplier” shall be inserted
- [NT-48/2023-CT](#) - Appoints 01-10-2023 as effective date for CGST Amendment Act 2023

## Rule 37. Reversal of input tax credit in the case of non-payment of consideration.-

- ~~(1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, but fails to pay to the supplier thereof, the value of such supply along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of [section 16](#), shall furnish the details of such supply, the amount of value not paid and the amount of input tax credit availed of proportionate to such amount not paid to the supplier in [FORM GSTR-2](#) for the month immediately following the period of one hundred and eighty days from the date of the issue of the invoice:~~
- ~~Provided that the value of supplies made without consideration as specified in [Schedule I](#) of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of [section 16](#).~~
- 
- ~~*“Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of [section 15](#) shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of [section 16](#).”;*~~
- 
- ~~(2) The amount of input tax credit referred to in sub-rule (1) shall be added to the output tax liability of the registered person for the month in which the details are furnished.~~

## Rule 37. Reversal of input tax credit in the case of non-payment of consideration.-

- (1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, but fails to pay to the supplier thereof, the amount towards the value of such supply, **whether wholly or partly**, along with the tax payable thereon, within the time limit specified in the second proviso to sub-section(2) of section 16, **shall pay, or reverse**, an amount equal to the input tax credit availed in respect of such supply, **proportionate to the amount not paid to supplier**, **along with interest payable thereon under section 50**, while furnishing the return in FORM GSTR-3B for the tax period **immediately following the period of one hundred and eighty days from the date of the issue of the invoice**:
- Provided that the value of supplies made without consideration as specified in [Schedule I](#) of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of [section 16](#):
- Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause (b) of sub-section (2) of [section 15](#) shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.;
- (2) Where the said registered person subsequently makes the payment of the amount towards the value of such supply along with tax payable thereon to the supplier thereof, **he shall be entitled to re-avail the input tax credit referred to in sub-rule (1)**.

## Rule 37. Reversal of input tax credit in the case of non-payment of consideration.-

- ~~• (3) The registered person shall be liable to pay interest at the rate notified under sub-section (1) of section 50 for the period starting from the date of availing credit on such supplies till the date when the amount added to the output tax liability, as mentioned in sub-rule (2), is paid.~~
- (4) 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.

## Key Highlights

From when interest is applicable? (Date of Invoice or date on which credit availed or on completion of 180 days.

Whether interest payable can be litigated?

Whether reavailment of ITC can be after due date?

On account of Vendors outstanding for more than 180 days

## What means by failure to pay

- Retention Money?
- Agreement?

# Reversal of ITC

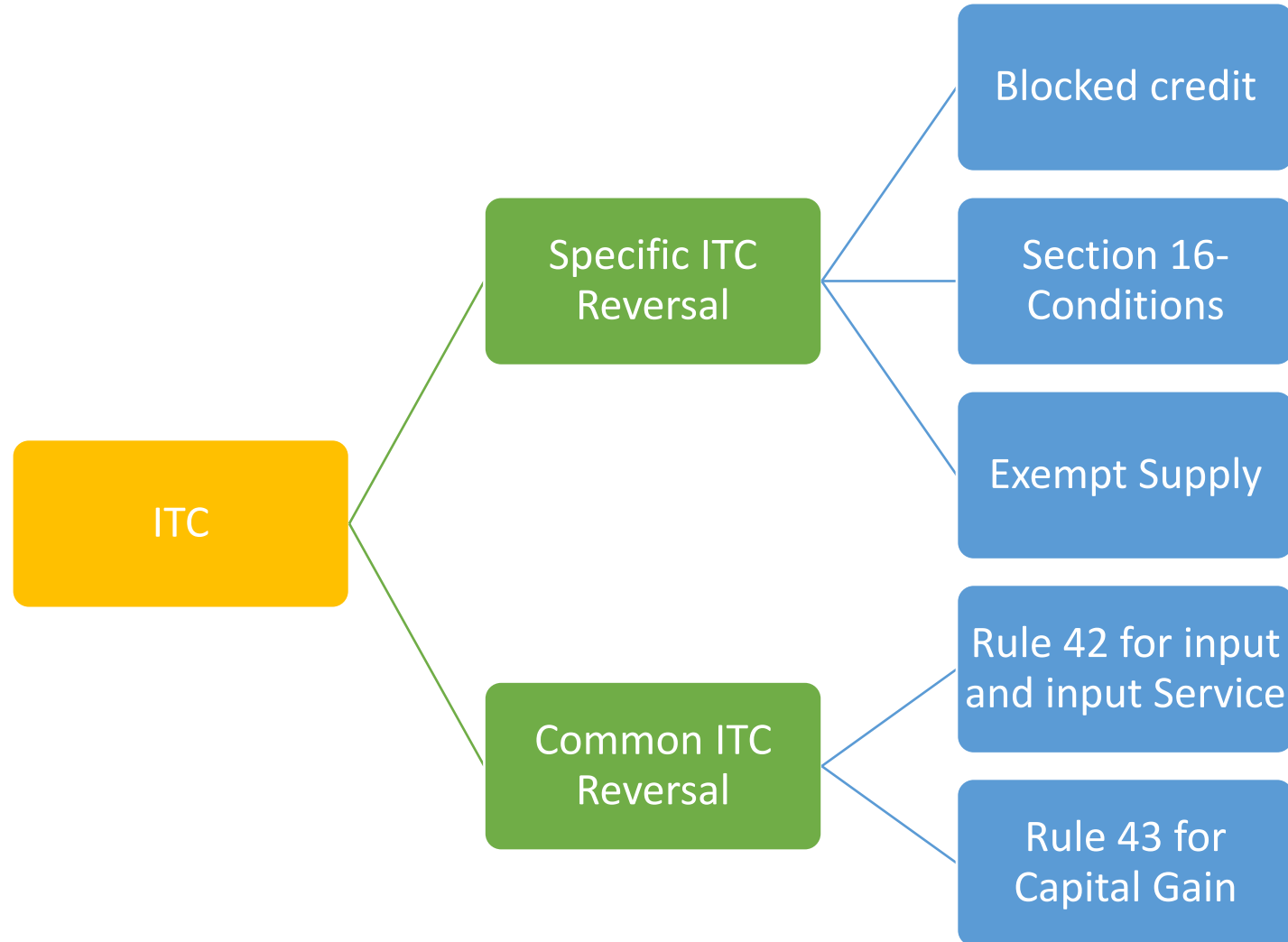
# Reversal of ITC

<p>Section 17 (1) of the CGST Act – Goods and Services used partly for business and partly for other purpose</p>	<p>Reversal to the extent of</p> <ul style="list-style-type: none"><li>- Restricted to so much of the input tax as is attributable to the purposes of his business</li></ul>
<p>Section 17 (2) of the CGST Act</p> <ul style="list-style-type: none"><li>- Taxable supplies including zero rated supply and Exempt Supply</li></ul>	<p>Reversal to the extent of exempt supply and/or nil rated</p>
<p>Section 17(5) of the CGST Act</p>	<p>Negative list</p>

# ITC Comprises of``

Nature	ITC Availability
Used for Taxable Supply	Yes
Exclusively used for other than business	No
Exclusively used for Exempt	No
Included in Blocked List [Section 17 (5)]	No
ITC used partly of taxable supply and exempt Supply	Partly available

# ITC



## Section 17 - Apportionment of credit and blocked credits

- (1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is **attributable to the purposes of his business**.
- (2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is **attributable to the said taxable supplies** including zero-rated supplies

## Section 17

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely :—

(a) Motor vehicles **for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), vessels and aircraft** except when they are used -

(i) For making the following taxable supplies, namely

(A) further supply of such vehicles or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles

## Section 17

(aa) Vessels and aircraft except when they are used-

(i) for making the following taxable supplies, namely:-

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) For transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

## Section 17

- Provided that the input tax credit in respect of such services shall be available-
  - (i) Where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;
  - (ii) Where received by a taxable person engaged-
    - (I) in the **manufacture** of such motor vehicles, vessels or aircraft; or
    - (II) in the supply of **general insurance** services in respect of such motor vehicles, vessels or aircraft insured by him

## Section 17

(b) the following supply of goods or services or both-

- (i) Food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, **renting or hiring of motor vehicles**, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, **life insurance and health insurance**:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

- (i) Membership of a club, health and fitness centre; and
- (ii) Travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is **obligatory** for an employer to provide to its employees **under any law** for the time being in force.

## Section 17

- (c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
- (d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business

***Explanation.*** — For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, **to the extent of capitalisation,** to the said immovable property

## Section 17

- *Explanation.*— For the purposes of this Chapter and Chapter VI, the expression “plant and machinery” means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes—
  - (i) land, building or any other civil structures;
  - (ii) telecommunication towers; and
  - (iii) pipelines laid outside the factory premises.

## Safari Retreats P Ltd. [ 2019-TIOL-1088-HC-ORISSA-GST]

- Input credit obtained on construction of immovable property - On letting out of property covered under GST, assessee retains property and does not dispose it of
- Hence, condition in Section 17(5)(d) ibid of non-availment of input credit of goods or services received by assessee for construction of immovable property, was not applicable
- Denial of credit on narrow interpretation of Department of Section 17(5)(d) ibid, rejected as it would frustrate objective of 2017 Act to prevent multi-taxation and result in assessee paying huge amount of GST for which he was not liable
- if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the Central Goods and Services Tax Act, 2017.

## Section 17

- (e) goods and/or services on which tax has been paid under section 10;
- (f) goods or services or both received by a non-resident taxable person except on goods imported by him;
  - (fa) goods or services or both received by a taxable person, which are used or intended to be used for activities relating to his obligations under corporate social responsibility referred to in section 135 of the Companies Act, 2013;*
- (g) goods and/or services used for personal consumption;
- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and
- (i) any tax paid in terms of sections 74, 129 or 130

## Key issues

ITC on expired  
goods

Written-off  
inventory value

Sale promotion  
item to distributor

Way Forward

# Way Forward

## Vendor Communication

- On-Board
- Return Filing
- Active Registration

## Internal Control

- Responsibility Matrix
- Reconciliation
- Maker and Checker

# Blocking of Input Tax Credit

# Legal Provision

NT-18/2022-CT- Finance Act

2022 provisions made

effective **01-10-2022 to insert**

**43A**

NT-75/2019-CT- inserts rule

**86A - 26th December, 2019**

# Legal Provision – Section 43A

## **Sec-43A - Procedure for furnishing return and availing input tax credit**

- *(6) The supplier and the recipient of a supply shall be **jointly and severally liable** to pay tax or to pay the input tax credit availed, as the case may be, in relation to **outward supplies for which the details have been furnished under sub-section (3) or sub-section (4) but return thereof has not been furnished.***

# Rule 86A -Conditions of use of amount available in electronic credit ledger – Blocking of ITC

Supplier found non-existent or not conducting business at its registered place

Supply without receipt of goods or services or both

The tax charged in respect of which has not been paid to the Government

Recipient found non-existent or not conducting business at its registered place

the registered person availing ITC is not in possession of a tax invoice or debit note or any other document prescribed

## Key Highlights

Whether ITC can be blocked for every vendor where supplier is found to issued fake invoices?

Whether ITC can be blocked without recording 'reason to believe' in writing

## Rule 86A – Key Provisions

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(1).....**may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.**

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(2)The Commissioner, or the officer authorised by him under sub-rule (1) **may, upon being satisfied that** conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

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(3) Such restriction shall cease to have effect after the expiry of a period of **one year from the date of imposing such restriction.**

# Judgements

Case law

- NEW NALBANDH TRADERS [2022 (66) G.S.T.L. 334 (Guj.)

Issue

- Order blocking ITC under Rule 86A(1) of CGST Rules, 2017 solely on ground that supplier of goods was found to be fake and its GST registration was suspended

Observation

- *Aforesaid Rule invocable only if two conditions fulfilled; firstly, Commissioner must satisfy himself on basis of objective materials available before him that blocking of ITC availed fraudulently necessary and secondly, he must record reasons in writing for such exercise of power*

# Judgements

## Observation

- *Term 'reasons to believe' occurring in aforesaid Rule must have a rational connection with or relevant bearing on formation of belief - It is a subjective term and can be interpreted differently by different individuals - Unless two prerequisites fulfilled viz. 'satisfaction of Commissioner' and 'recording of reasons in writing' for exercise of power by him for blocking of ITC, such ITC cannot be blocked even if it is found to have been fraudulently availed - Word 'may' used with second prerequisites of 'recording of reasons in writing' to be construed as 'must', meaning thereby, reasons must be recorded in writing in each and every case.*

# Cross Charge Vs ISD

## Cross Charge Vs ISD

### Cross Charge

- GST is charged on goods or services to distinct persons
- Cross charge refers to the transfer of both goods and/or services

### ISD

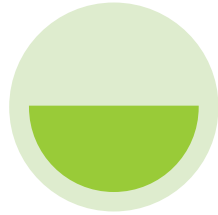
- Transfer of ITC attributable to the specified beneficiary distinct person.
- Cross charge refers to the transfer of both goods and/or services

## Cross Charge Vs ISD

ISD mechanism is required for distribution of credit pertaining to services received by other locations, wherein the invoices are raised on HO.

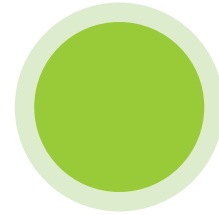
On the other hand, the cross charge is to be used for the charging for the cost of support services provided by HO to other locations while consuming various goods & services for providing such support services.

# Legal Provisions



## ISD

Section 20 read with  
Rule 39



## Cross charge

Schedule 1. Under this Schedule, it is specified that any supply, even if made without consideration, between two distinct persons (different GST registrations, same PAN) will be treated as supply.

# Cross Charge Vs ISD – Issues in case of Supply of Services

Whether to opt Cross  
charge or ISD?

How to Value Free  
supply of service?

Inclusion of the cost of  
employees for  
valuation

# Cross Charge Vs ISD – Clarification issued

## 35<sup>th</sup> GST Council Meeting

- Clarify that taxpayers were mandatorily required to follow ISD, and cross charge is required to be followed for support services provided by HO,
- Employee Costs to be included

## 50<sup>th</sup> GST Council meeting

- ISD registration is not mandatory and where an HO procures services from third party which are attributable to both HO and BOs or other Bos
- Employee cost need not be included for the purpose of cross charge of internally generated services and where the recipient is entitled to full input tax credit,

Clarification  
regarding  
taxability of  
services provided  
between  
distinct persons

ISD mechanism is not mandatory  
to distribute such input tax credit.  
HO can instead issue tax invoices  
u/s 31 of CGST Act in respect of  
common input services procured  
from a third party

# Clarification regarding taxability of services provided between distinct persons



For valuation of supplies between distinct person, section 15 and rule 28 shall be applicable



Where the recipient is eligible for full ITC, and the invoice is not issued for any supplies rendered between distinct persons

the value shall be deemed to be 'nil' and considered as open market value



Salary cost of employees not required to be included in cross charge.

## Key Issues

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Despite the Circular, there is still an ambiguity regarding the costs which need to be included for the purpose of cross charge of internally generated services i.e., support services provided by HO to other locations.

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There are certain services received by HO, for which credit is restricted under Section 17(5) of the CGST Act such as canteen services, car hire charges, etc. Further, there are some services received by HO, which do not attract GST such as financing services. Since no credit is availed by HO on these services, there may not be any need to include cost of such services as part of cross charge between distinct entities, which as a concept was introduced to avoid any breakage in the credit chain.

Clarification needed

Manner of valuation of  
cross charge



CHARGING OF  
INTEREST –  
WRONG  
AVAILMENT AND  
UTILIZATION OF ITC



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AMENDMENT W.R.T LEVY OF  
INTEREST [NOT. NO.09/2022-CT  
AND NOT. NO.14/2022-CT ]

## 1. SECTION 50

50. (1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent, as may be notified by the Government on the recommendations of the Council.

~~■ Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.~~

*Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be payable on that portion of the tax which is paid by debiting the electronic cash ledger. [ Substituted (w.e.f. 1st July, 2017) by s. 112 of The Finance Act, 2021 , Brought into force on 1st June, 2021 vide Notification No. 16/2021-Central Tax dated 1st June, 2021.*

# 1. SECTION 50

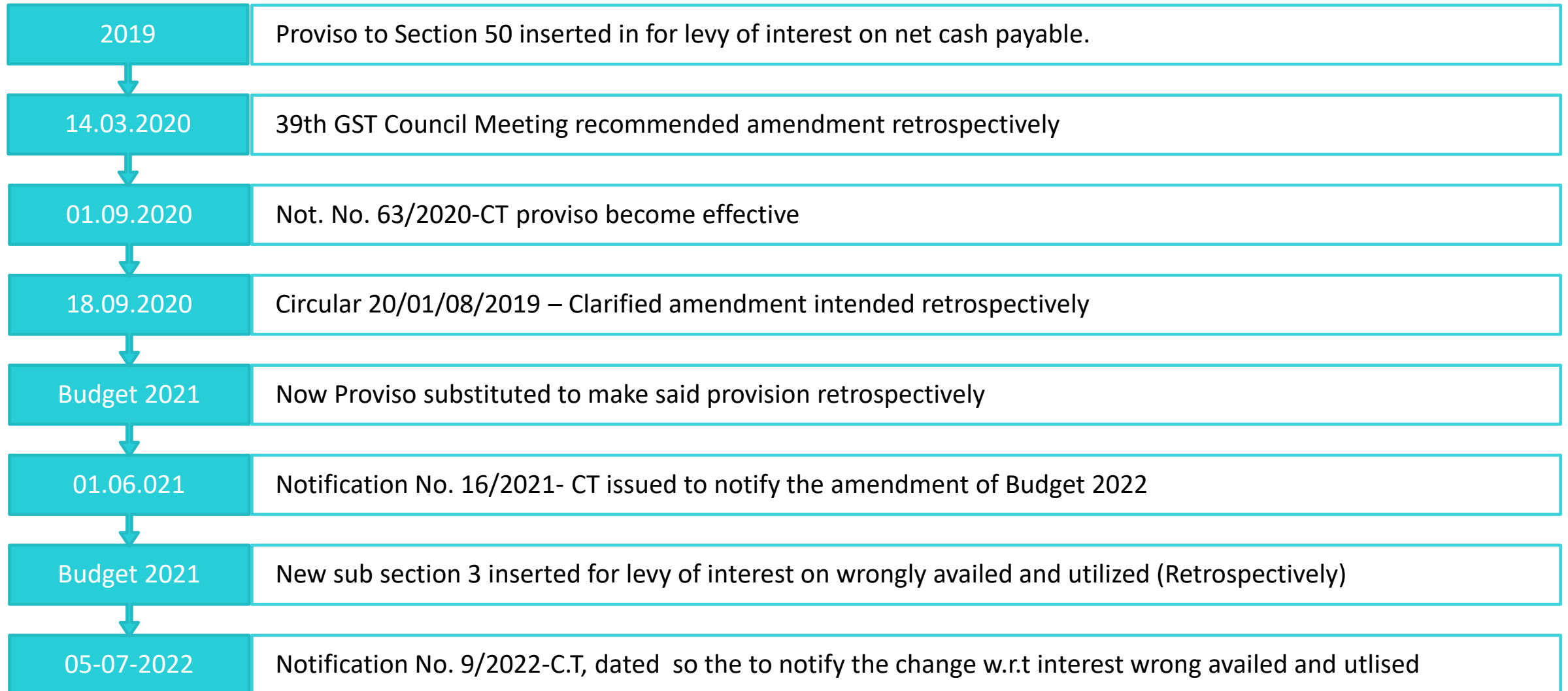
(2) The interest under sub-section (1) shall be calculated, in such manner **as may be prescribed**, from the day succeeding the day on which such tax was due to be paid.

*(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, **in such manner as may be prescribed.***

~~(3) A taxable person who makes an undue or excess claim of input tax credit under subsection (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty four per cent, as may be notified by the Government on the recommendations of the Council.~~

[Substituted (w.e.f. 1st July, 2017) by s. 111 of The Finance Act 2022 (No. 06 of 2022) - brought into force w.e.f 05-07-2022 vide [Notification No. 9/2022-C.T](#), dated 05-07-2022 ]

# INTEREST SAGA



# 1. AMENDMENT IN SECTION 50

Amendment

- Amendment of Section 50(3) of the CGST Act

Earlier

- ~~(3) A taxable person who makes an **undue or excess claim of input tax credit** under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such **undue or excess claim** or on such **undue or excess reduction**, as the case may be, at such rate not exceeding twenty four per cent., as may be notified by the Government on the recommendations of the Council.~~

# 1. AMENDMENT IN SECTION 50

Now

- *(3) Where the input tax credit has been **wrongly availed and utilised**, the registered person shall pay interest on such **input tax credit wrongly availed and utilised**, at such rate not exceeding twenty-four per cent, as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.*

# 1. AMENDMENT IN NOTIFICATION

Amendment	<ul style="list-style-type: none"><li>• Seeks to amend notification number G.S.R. 661(E), dated the 28.06.2017</li></ul>
Finance Act 2022	<ul style="list-style-type: none"><li>• Proposed to notify rate of interest under section 50 (3) of the CGST Act as 18%, retrospectively, with effect from the 1.07.2017.</li></ul>
Not. No.09/2022-CT	<ul style="list-style-type: none"><li>• Appoints the 5.07.2022 as date to notify date on which section notified</li></ul>
Notification 14/2017	<ul style="list-style-type: none"><li>• Rule 88B inserted w.e.f 01.07.2017</li></ul>
What is the rate of Interest	<ul style="list-style-type: none"><li>• ?</li></ul>

## 1. . AMENDMENT IN RULES – NOT. NO 14/2022-CT

- (1) *In case, where the supplies made during a tax period are declared by the registered person in the return for the said period and the said return is furnished after the due date in accordance with provisions of section 39, except where such **return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period**, the interest on tax payable in respect of such supplies shall be calculated on the portion of tax which is paid by debiting the electronic cash ledger, for the period of delay in filing the said return beyond the due date, at such rate as may be notified under sub-section (1) of section 50.*
- (2) *In all other cases, where interest is payable in accordance with sub section (1) of section 50, the interest shall be calculated on the **amount of tax which remains unpaid, for the period starting from the date on which such tax was due to be paid till the date such tax is paid**, at such rate as may be notified under sub-section (1) of section*

## 1. . AMENDMENT IN RULES – NOT. NO 14/2022-CT

- (1) (3) *In case, where interest is payable on the amount of input tax credit wrongly availed and utilised in accordance with sub-section (3) of section 50, the interest shall be calculated on the amount of input tax credit wrongly availed and utilised, for the period starting from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of section 50*

# 1. AMENDMENT IN RULES – NOT. NO 14/2022-CT

Cases where amount  
of ITC wrongly availed  
and utilised

Interest is to be calculated on the amount of interest wrongly availed and utilised, for the period starting from the date of utilisation till the date of reversal of such credit or payment of tax

What is the date from which interest is to be computed? (Refer Explanation)

If payment of Tax – Due date or Date of filing of return 

Other cases –Date of Debit in Credit ledger

## 1. KEY HIGHLIGHTS

Provide for levy of interest only on ITC wrongly availed and utilized but what about penalty?

What about balance in SGST but not in CGST and vice versa?

What if there is increase and/or decrease in electronic credit ledger?

Whether Refund of excess paid interest can be explored?

## CLARIFICATION ON CHARGING OF INTEREST

### Legal Provision

- Interest to be charged u/s 50 of the CGST Act in cases of wrong availment of IGST credit and reversal thereof

### Issue

- Whether the balance of ITC available in electronic credit ledger under the head of IGST only needs to be considered or total ITC under the heads of IGST, CGST and SGST taken together, has to be considered?

### Clarification

- interest will be applicable when the balance of IGST, CGST and SGST all put together is less than the wrongly availed IGST credit.

## CLARIFICATION ON CHARGING OF INTEREST

### Legal Provision

- Interest to be charged u/s 50 of the CGST Act in cases of wrong availment of IGST credit and reversal thereof

### Issue

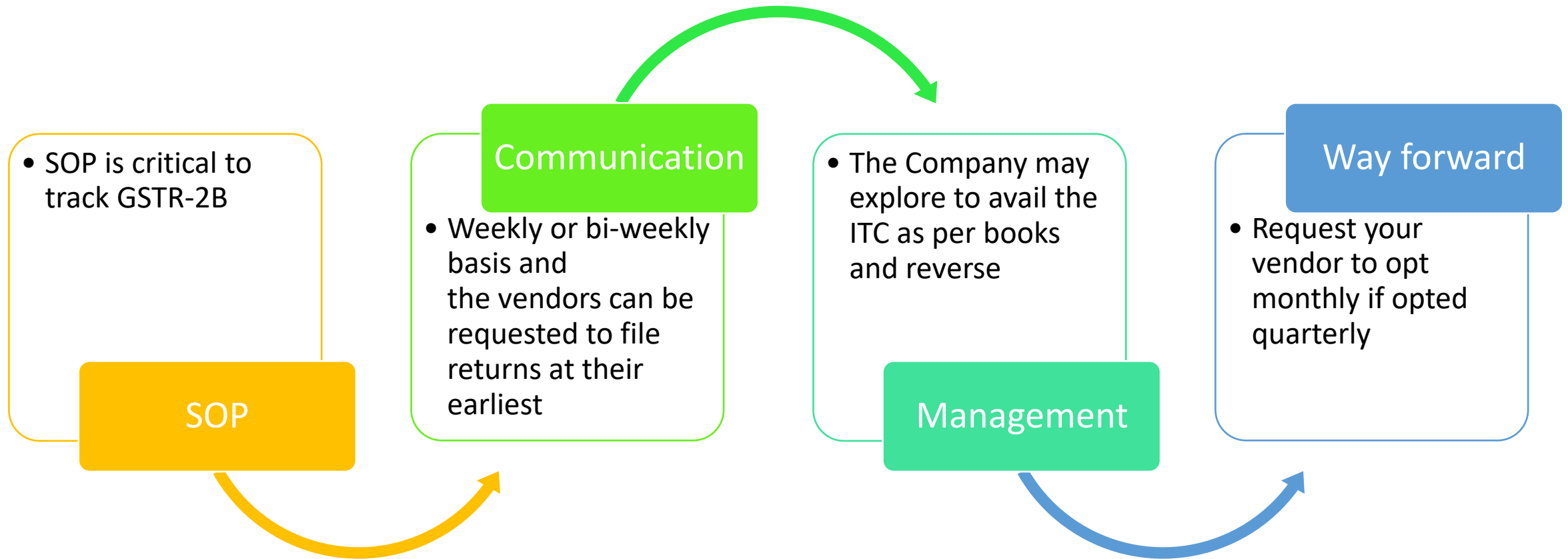
- Whether the credit of compensation cess available shall be taken into account while considering the balance of electronic credit ledger for the purpose of calculation of interest under sub-rule (3) of rule 88B of CGST Rules in respect of wrongly availed and utilized IGST, CGST or SGST credit.

### Clarification

- Compensation cess in electronic credit ledger cannot be considered for computation of interest under rule 88(3).

Way Forward

# Vendors Mangement!



# Compliances

Correct and timely compliances to avoid litigation



Timely reconciliation of data helps for vendor communication



Maker checker methodology will help for reduction of error





Join our WhatsApp Group for Updates via link below or Scan QR

Code <https://chat.whatsapp.com/Fzcl94Ekw5h03BOdB2wWJ3>

A screenshot of a WhatsApp group QR code. At the top is a circular icon with two people. Below it, the text reads "VBK & Co GST -FTP Updates" and "WhatsApp group". In the center is a large QR code with a WhatsApp logo in the middle. At the bottom, there is a disclaimer: "This group QR code is private. If it is shared with someone, they can scan it with their WhatsApp camera to join this group." and a link "Reset QR code" in green text.

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