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Rule 36(4) added in the CGST Act is Anti-MSME
And against the law of the land

In the CGST Rules, 2017 sub-rule (4) has been added in Rule 36 vide Notification no. 49/2019 Central Tax dated 09-10-2019, as below -

“(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.”. 4. In the said rules, in rule 61,- (a) for sub-rule (5), the following sub-rule shall be substituted, with effect from the 1st July, 2017.

Vide this Notification sub-rule (5) has also been added retrospectively w.e.f. 01-07-2017 but same is not a matter of consideration herein.

In continuation it will be useful to describe the present legal scenario prescribing for submission of return.

Accordingly -

- (a) In the above circumstances without affording any opportunity to the purchaser/recipient of the goods he is denied benefit of ITC, mechanically.
- (b) Consequently without affording to such purchaser/recipient of goods any opportunity of any kind the system shall treat the case as of non-payment of admitted tax and therefore tax and interest shall be payable accordingly.
- (c) In the GSTN system no relief has been provided to the sufferer i.e. purchaser/recipient of supplies to lodge his grievances. This is clearly in flagrant violation of principle of *audi alteram partem* i.e. no person shall be condemned unheard and natural justice also.

Vicarious Liability

It may be noted that in such circumstances where one is held responsible for the action or inaction of the other in law is known as *Vicarious Liability*. However, to apply this principle there should be some pre-existing relationship between the two, and court should come to the conclusion that there was some pre-existing relationship of any nature besides the seller/purchase or supplier/recipient.

This concept is known as *Vicarious Liability*, Latin proverb *qui facit per se per alium facit per se*, which means, “*He who does an act through another is deemed in law to do it himself*”. This concept travelled from Latin Law to English Law and from there to our country but under the law of torts.

It may be noted that in order to establish liability of one for the other, court has to be convinced, it has been held in several English cases and also by the Hon'ble Apex Court.

But contrary to it in CGST Act no system has been provided for the sufferer to record his grievances on the system or to record his explanation in any manner whatsoever. Neither Forum of Appeal is provided under the Act, meaning clearly thereby that one has to resort under the other provisions of Civil Law of the country to establish the genuineness of the claim of payment.

CGST Act imposes *Vicarious Liability* ignoring pre-existing relationship.

The Provision is against law of the land

- (1) **Hon'ble Apex Court in State of Maharashtra Vs. Suresh Trading Company, [109 STC 430]** held that a purchasing dealer was entitled by law to rely upon the certificate of registration of the selling dealer and to act upon it. Whatever might be the effect of a retrospective cancellation upon the selling dealer, it could have no effect upon any person who had acted upon the strength of a registration certificate when the registration was current. It was not the duty of persons dealing with registered dealers to find out whether a state of facts existed which would justify the cancellation of their registration, it was followed by Hon'ble Gujarat High Court, **State of Gujarat versus Delta Rubber & Allied Products [2015, TLD, P-282]**
- (2) Following its earlier judgement in Sri Vinayaga Agencies Vs. The Assistant Commissioner (CT) (W.P. No. 2038 of 2013 dated 29.01.2013 **Hon'ble Madras High**

Court held in M/s. T.V.L. Shanmuga Traders versus Commercial Tax Officer [Madras High Court - 2016 TLD, P-02] that the ITC claimed by the dealers cannot be reversed under Section 19(1) of TNVAT Act on the ground that the sellers have not paid the tax to the department.

- (3) **Commissioner, Commercial Taxes, U.P. Vs. Swadisht Oils Pvt. Ltd. [TTR No. 400/ 2016 decided on 29-09-2016]**

The assessee has been a registered dealer and his transactions were traceable and identified and hence the tribunal has rightly allowed input tax credit to the extent of Rs. 6,43,996/- as claimed by the assessee.

- (4) **C.T.T. vs. Sanjay Steel Suppliers [Alld. High Court TTR No. 253/15 decided on 17-07-2015]**

The assesseees were denied input tax credit only for the reason that the dealers were not registered. The authorities have ultimately found as of fact that during the relevant period the selling dealer as well as the purchasing dealers were duly registered and all payments were made through Bank which stood verified. The entire dealings were supported by tax invoices which established that the goods were tax paid.

- (5) As a matter of fact, if during the relevant period, "*selling dealer was duly registered*" and all payments to him were made by the assessee through the bank which stood verified. The purchases were made by the assessee against the tax invoice which shows that the goods were tax paid, the tax paid was not knocked off by the Hon'ble High Court, Allahabad in **C.T.T. vs. Arihant Prakashan [Alld. High Court TTR No. 30/15 decided on 05-05-2015]**

If Supplier/Purchaser are registered and Transaction is verifiable : ITC Allowable (Under VAT Laws)

Hon'ble Apex Court in State of Maharashtra Vs. Suresh Trading Company, [109 STC 430] while with the problem of denial of ITC by the department held that a purchasing dealer was entitled to rely upon the certificate of registration of selling dealer and to act upon it. On similar lines Hon'ble Allahabad High Court **C.T.T. vs. Arihant Prakashan [Alld. High Court TTR No. 30/15 decided on 05-05-2015]** held that if during the relevant period "*selling dealer was duly registered*" and all payments to him were made by the assessee through the bank which is true verified then purchasing dealer deserves for the credit of full

ITC, on similar lines ITC credit to the extent Rs. 6,43,996.00 was allowed by the Hon'ble Tribunal WAS held current and accordance with the lay by the Hon'ble Allahabad High in the case of **Commissioner, Commercial Taxes, U.P. vs. Swadisht Oils Pvt. Ltd.** [TTR No. 400/2016 decided on 29-09-2016] similarly the principle was applied by the Hon'ble Court. **C.T.T. vs. Sanjay Steel Suppliers** [Alld. High Court TTR No. 253/15 decided on 17-07-2015]

Scheme of Submission of Returns/Documents : Under the GST Laws

MONTHLY (Turnover Exceeding 1.5 crores in a year)	GSTR 3B	20 th Every Month Not for composition dealer
QUARTERLY RETURN (Upto 1.5 crores)	GSTR 01	11 th of every month
Composition Dealer (At will)	CMP 08	Next month of Quarter Ending 17 th
ANNUAL RETURN Normal taxpayer Aggregate Turnover upto 1.5 crores	GSTR 9	31st December (Optional)
Composition Dealer	GSTR 9A	At will

The Notification under discussion Rule 36(4) of GST Rules

From the above chart, it is clear that in majority of cases, a purchasing assessee has choice to purchase from (i) seller/supplier having Turnover exceeding upto 1.5 crore.

Asking the taxpayers to make cash payments beyond 20% of the eligible input tax credit for supplies not uploaded by the supplier is a substance financial loss to the purchaser and a constraint process of erosion of working capital. It will adversely affect the economy of the country because as people will be unwilling to pay cash and they might, in future decide not to make purchases from dealers upto turnover of Rs. 1.50 crores yearly opted for compounding scheme. A direct hit on the MSME sectors. Therefore, in one of the other way, it may lead to restrictive package against the establish policy of Government of India to promote a sector.

The Circular refers section 37(1) of CGST Act. In other words, the Circular will be applicable to all the tax-paying documents and the taxpayer will have to ascertain the same

from auto-populated Form GSTR-2A as available on the due date on filing of Form GSTR-1 under the section.

The complex issue of quarterly returns u/s 37(1) where the GSTR-1 shall be uploaded after a period of three months will further cause problems and complications and the Circular has gone totally silent on this issue.

Against Policies of Central/State Government

It is to be emphatically certified that this provision would ultimately compel the dealers in general and big dealers in particular to avoid making purchases from the registered person filing Quarterly Returns or opted for Composition Scheme.

The small scale industry sector output contributes almost 40% of the gross Industrial value-added 45% of the total exports from India (direct as well as indirect exports) and is the second largest employer of human resources after agriculture. The development of Small Scale Sector has therefore been assigned an important role in India's national plans.

In order to protect, support and promote small enterprises as also to help them become self-supporting, a number of protective and promotional measures have been undertaken by the Government of India.

Conclusion

As discussed above, newly added Rule 36(4) of GST Rules is not only against the MSME Industrial Policies of Central and State Government, which contribute about 45% of the Indian economy including export, but it is also against law of the land, as referred above and finally not tenable under law, as it imposes *Vicarious Liability* on the purchaser without any pre-existing relationship between seller/supplier and recipient/purchaser.

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