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By

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DIRECT TAXES

IMPORTANT RECENT JUDGMENTS

Contributed by CA Ramprasad T |

Issue: - Provisions of Sec 40(a)(ia) and it's retrospective application

CIT vs Calcutta Export Company¹ - Supreme Court

Facts: - Assessee is a partnership firm and claimed export commission charges on which TDS was deducted but paid the same after the end of previous year 2004-05 i.e. beyond the time limit mentioned in sec 201(1) of the Act.

The AO has disallowed the export commission as TDS should have been paid before the end of the previous year 2004-05 as per the provisions of Sec 40(a)(ia) as stood then.

Assessee has filed an appeal against order of AO and CIT(A) has allowed appeal as result the export commission was allowed as deduction.

Revenue filed appeal against order of CIT(A) before Tribunal, which was dismissed. Revenue further appealed before High Court. The honorable High Court dismissed appeal. Finally, an appeal was filed before the honorable Supreme Court.

Contentions made before Supreme Court: -

Revenue contended that provisions of Section 40(a)(ia) being prohibitory in nature which requires the assessee to pay the TDS deducted within the time limits.

As per the provisions of the above-mentioned section which is relevant for the Assessment Year 2005-06, no expenditure of the nature mentioned there in be allowed as deduction while computing income under the head Business or Profession unless tax is deducted at source and the same is paid within the time limits mentioned in sec 201(1).

Since the assessee has paid the TDS beyond the time limit mentioned in Sec 201(1) the expenditure shall be disallowed.

Assessee contended that the purpose of insertion of provisions of sec 40(a)(ia) was to ensure the compliance of TDS provisions and not to punish the assessee who have deducted and paid TDS to government sooner or later and the same is supported by memorandum to Finance Act, 2005.

Supreme Court held that the very purpose of provisions of sec 40(a)(ia) is to ensure tax compliance. The result of application of the provisions of the said section is shifting of year in which the expenditure can be claimed as a deduction.

In a case where the tax deducted at source was duly deposited with the government within the prescribed time, the said amount can be claimed as a deduction from the income in the previous year in which the TDS was deducted.

¹93 taxmann.com 51

However, when the amount deducted in the form of TDS was deposited with the government after the expiry of period allowed for such deposit then the deductions can be claimed for such deposited TDS amount only in the previous year in which such payment was made to the government.

Finance Act, 2008 has made an amendment to the provisions of the above section where by the deduction relating to the month of March of previous year (which is last month of the previous year) be allowed provided the tax deducted at source for the last month is paid before the due date for filing of return of income U/S 139(1) of the Act. Deduction of tax relating to any other month should be deposited before the end of the previous year. This amendment was made with retrospective effect from 01/04/2005 i.e. the date of which the section 40(a)(ia) was introduced.

Further Finance Act, 2010 has made an amendment which provide that all the TDS made during the previous year can be deposited before the due date for filing the return of income U/S 139(1).

TDS results in collection of tax and the deductor discharges dual responsibility of collection of tax and its deposition to the government. Strict compliance of Section 40(a)(ia) may be justified keeping in view the legislative object and purpose behind the provision but a provision of such nature, the purpose of which is to ensure tax compliance and not to punish the tax payer,

Legislature can and do experiment and intervene from time to time when they feel and notice that the existing provision is causing and creating unintended and excessive hardships to citizens and subject or have resulted in great inconvenience and uncomfortable results.

A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the Section, is required to be read into the Section to give the Section a reasonable interpretation and requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the Section as a whole.

The purpose of the amendment made by the Finance Act, 2010 is to solve the anomalies that the insertion of section 40(a)(ia) was causing to the bona fide tax payer.

The above view is supported by judgement of this court Allied Motors (P) Ltd vs CIT 224 ITR 677.

Therefore, amended provision of Sec 40(a)(ia) of the IT Act should be interpreted liberally and equitable and applies retrospectively from the date when Section 40(a)(ia) was inserted i.e., with effect from the Assessment Year 2005-2006 so that an assessee should not suffer unintended and deleterious consequences beyond what the object and purpose of the provision mandates.

The amendment was curative in nature, it should be given retrospective operation as if the amended provision existed even at the time of its insertion.

Issue: - Expenditure on Software is Capital or Revenue

Oriental Bank of Commerce vs ACIT² -High Court of Delhi.

²TS-217-HC-2018

Facts: - Assessee has spent amount towards acquiring various categories of software and charged the same as revenue expenditure.

AO disallowed the expenditure by holding the same as capital expenditure.

Assessee has filed an appeal before CIT(A) against the order of AO. The CIT(A) upheld the order of AO. Further appeal was made before ITAT.

The **Assessee contended** that software was a specialized one and meant for banking and bank related operation. The motive for acquiring the same was to optimize performance and streamline the efficiency of the bank.

Revenue contended that the software is depreciable asset for which the rates of depreciation were set out in part B of the schedule to the Income Tax Rules.

ITAT upheld the order of lower authorities.

On further appeal to High Court it held that the articles acquired are licenses. They do not confer any enduring right. The copyright licenses are used for the duration as spelt out by licensor.

Furthermore, the bank objective is not carry on software business, rather it uses the computer software as a tool to maximize the performance and streamline its efficiency.

In Asahi India Safety Glass Ltd 346 ITR 329(relying on principles in Supreme Court in case of Alembic Chemicals Works Co. Ltd vs CIT 177 ITR 377) this Court held that the expenditure which enables the profit-making structure to work more efficiently leaving the source of profit making structure untouched would be revenue expenditure.

Fine tuning business operations to enable the management to run its business effectively, efficiently and profitably would be expenditure of revenue nature.

Mere circumstances that depreciation rate is spelt out in the schedule to income-tax is not conclusive as to the nature of expenditure and whether it resulted an enduring advantage to a particular assessee.

Assessee uses a specific customized software which is relevant to banking activities. Except the use of software, the nature of expenditure otherwise incurred for streamlining functions is a revenue expenditure.

Issue: - Whether sale less than its purchase price result in creation of Intangible?

Flipkart India Pvt. Ltd vs Asst. CIT- ITAT Bang

Facts: -The Assessee is a company. During the relevant previous year, it was engaged in the business of wholesale trader/distributor of books, mobiles, computers and related accessories.

Assessee purchased goods at higher price and selling them lower price. AO was of the view that the action of the Assessee in selling goods at less than cost price was not a normal business practice.

Assessee explained that sale through electronic form (e-commerce) as against the traditional sale through retail outlets had just begun in 2012. Since e-commerce was in its nascent stage, it was very difficult to create trust and awareness of sale through e-commerce. The volume of sales was very low. One of the ways to increase volume of sales and attract buyers to e-commerce was to offer discounted prices. Higher volume of sales will lead to economies of scale.

AO concluded that the strategy of selling goods at lower than cost price was to establish customer goodwill and brand value (marketing intangibles) in the long run and reap benefits in the later years. **Hence, selling at a price below prices is not an irrational economic behaviour. It is a clearly thought strategy to establish a monopoly in market by brand building by generating consumer goodwill. This strategy naturally leads to generation of intangible assets and enduring benefit.**

Therefore, the loss to the extent it is created due to predatory pricing should be regarded as capital expenditure incurred by the Assessee and should be disallowed.

AO further concluded that the value of marketing intangibles is an asset and entitled for depreciation @25%.

AO referred to three approaches of valuation of intangibles prescribed by OECD in its convention of Base Erosion and Profit Shifting (BEPS) viz., cost approach, income approach and market approach. The AO adopted cost approach in which a reasonable profit margin is attributed to the cost of purchases and to the extent the profit is foregone by the Assessee was to be considered as the value of intangible.

Aggrieved by the order of the AO, the Assessee preferred appeal before CIT(A). The CIT(A) confirmed the order of the AO. The CIT(A) in exercise of his powers of enhancement u/s.251(2) of the Act also withdrew depreciation of 25% on the intangible assets allowed by the AO while computing total income, because though the Assessee incurred expenses for creating intangible assets but was not owner of the intangible. The Hon'ble Karnataka High Court in W.P.No.6533 of 2018 (T-IT) by its order dated 15.2.2018 has directed the Tribunal to hear the appeal filed by the Assessee.

Assessee contended that Income under the head "Income from Business or Profession" has to be computed in accordance with Sec.28 to Sec.44DB of the Act. The starting point of computation of income from business has to be therefore the sales as recorded by the Assessee in its books of accounts. The books of accounts of the Assessee have not been rejected. In such circumstances the AO cannot resort to a process of estimating income of the Assessee.

Assessee contended, inter- alia, relying on the judgement of Supreme Court in SA Builders Vs. CIT 288 ITR 1(SC) an expenditure incurred for as a measure of commercial expediency should be allowed as a deduction.

The expression “commercial expediency” is an expression of wide import and includes such expenditure as a prudent businessman incurs for the business. The expenditure may not have been incurred under any legal obligation, but it is allowable as a business expenditure if it was incurred on grounds of commercial expediency.

What is commercial expediency in a given facts and circumstances of a case is the sole discretion of the Assessee and not of the revenue authorities.

Assessee further contended that there was no acquisition of any intangibles nor was there any outflow towards acquiring intangibles. The revenue authorities have presumed that the Assessee has incurred expenditure when there is no basis for coming to such conclusion. To say that an expenditure has been incurred or accrued to an Assessee there should either be an outflow of funds or incurring of a liability. There was no such outflow or accrual of liability during the previous year.

Revenue contended that the business model of the Assessee by following predatory pricing was to create asset base of customers and build brand value/goodwill or any other form of intangibles.

Despite making losses, the Assessee’s shares are being purchased by investors at a high premium. In this regard two instances of purchase by venture capitalists of the shares of the Assessee of Re.1/- in the previous years relevant to AY 15-16 and 14-15 at a premium of ₹ 1899/- and ₹ 595/- respectively. such high share premium is justified only because of the asset base created by the Assessee in the form of brand value.

The ITAT held that the income of the Assessee in the present case would fall within Sec.28(1) of the Act.

Section 145 of the Act provides how income chargeable under the head “Profits and gains of business or profession” or “Income from other sources” has to be computed and it lays down that such income shall, subject to the provisions of sub-section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Sub-section (2) of Section 145 provides that the Central Government may notify in the Official Gazette *from time to time income computation and disclosure standards* to be followed by any class of assesseees or in respect of any class of income. Sub-Section (3) of Section 145 provides that Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub-section (1) *has not been regularly followed by the assessee, or income has not been computed in accordance with the standards notified under sub-section (2)*, the Assessing Officer may make an assessment in the manner provided in section 144.

It is thus clear from the statutory provisions that the starting point of computing of income from business is the profit or loss as per the profit and loss account of the Assessee. The AO cannot disregard the profit or loss as disclosed in the profit and loss account, unless he invokes the provisions of Sec.145(3) of the Act. In the present case AO has not invoked provisions of Sec 145(3) and as a result AO was not empowered to go beyond the book results.

The Supreme Court in case of Calcutta Discount Company³ held that when one trader transfers his goods to another trader at a price less than the market price, the taxing authority cannot take into consideration the market price of those goods, ignoring the real price fetched. Income which has accrued or arisen can only be subject matter of total income and not income which could have been earned but not earned.

Assessee is liable to tax on income which accrues or arises as per sec 5 of the Act. There was no provision in the Act by which AO can ignore the sale price declared by the assessee and proceed to enhance sale price without material to show that assessee has realized higher sale price.

The honorable Supreme Court in case of B.C Srinvasa Setty⁴ for creation of intangibles like say goodwill it is not possible to ascertain in terms of money the cost of acquisition of goodwill; it is equally impossible to ascertain in terms of money the cost of addition or alteration to the quality of goodwill which led to the increase in its value. It is therefore not possible to say that profits foregone created goodwill or any other intangibles or brand to the Assessee.

The argument on the existence of intangibles/brands or goodwill was on the basis of purchase of Assessee's shares at a premium by investors. Despite making losses, the Assessee's shares were purchased by investors at a high premium is an argument without bringing on record any material to substantiate that valuation of shares was done only because of value being ascribed to brand or goodwill or any intangibles.

Action of AO in disregarding the book results and presuming that assessee has incurred expenditure for creating intangible assets is without any basis.

ITAT further held that the loss declared by the assessee in the return of income should be accepted by AO.

³91 ITR 8

⁴128 ITR 294

LABOUR LAWS

FAQS UNDER PAYMENT OF GRATUITY ACT

Contributed by S V Ramachadra Rao |

1. An establishment has less than 10 employees; one of the employees quits his employment after serving for a period of 7 years. Will he be entitled to receive gratuity?

No. The employee is not entitled to receive gratuity under the Payment of Gratuity Act, as the establishment is not covered under the Act. The Payment of Gratuity Act is applicable only to shops and establishments in which 10 or more persons are employed or were employed on any day of the preceding twelve months.

2. Whether the Payment of Gratuity Act is applicable to educational institution?

Yes. An educational institute will be covered under the Payment of Gratuity Act. The Act has been amended with effect from 3.4.1997 to cover the educational institutes. [*Shri GurudevAyurvedMahavidyala Gurukul Ashram Vs Madhav 1994 LLR 894 Bom HC*]

3. Whether the Payment of Gratuity Act is applicable to a Temple?

Yes. Payment of Gratuity Act will be applicable to employees working in a temple. [Administrator, Shree Jagannath Temple Puri Vs JagannathPadhi, 1992 LLR 737 Ori HC. Management of Sri Venkataramana Temple V Sri Hale Mariyamma Temple, Kapu, 2013 LLR 163 Karn HC]

4. Whether non-commercial and non-profit motive establishments are covered under the Gratuity Act?

Yes. An establishment under Payment of Gratuity Act, has wide meaning and includes commercial establishments as well as non-commercial establishments and no limited meaning can be given to the word 'establishment' which has been referred in section 1(3)(b) of the act, hence the Indian Red Cross Society will be liable to pay gratuity to tis employees. [Indian Red Cross Society V Vidyaben H Vyas (2004) I LLJ 802 Guj HC]

5. Whether Trainees / Apprentices are entitled to gratuity?

Apprentices registered under the Apprentices Act are not entitled to gratuity. However, trainees and apprentices not appointed under the Apprentices Act will be entitled to gratuity. H Ramaooa V GM Sri Yellamma Cotton Woollen and Silk Mills 2008 LLR 839 Kar HC

6. Whether casual workers working for more than 5 years are entitled to gratuity?

Yes. Casual workers working for more than 5 years and worked for 240 days in each of the year are entitled to receive gratuity under the payment of Gratuity Act. [DPO, Southern Railway, Palghat V RLC (c) 2010 LLR 414 Mad HC]

The Madras High Court in the matter of Madurantakkam Coop Sugar Mills Ltd V JCL [2012 LLR 443 SN] held that the Payment of Gratuity Act does not make any distinction as to whether an employee is casual, temporary or NMR.

The Himachal Pradesh HC [2012 LLR (SN) 895] held that even a daily-wager, who has completed five years of service, would be entitled to gratuity under the Payment of Gratuity Act.

7. *Whether contractor's employees are covered under the Act and whether the Principal Employer has any liability to pay gratuity?*

Yes. Contractor is primarily liable to pay gratuity. If not paid by the contractor, the Principal employer will have to pay. [SE Mettur Thermal Power Sttion, V Appllate Authority Coimbatore 2012 LLR 1160 Mad HC]

Principal employer can be directed to pay gratuity to the employees of the contractor, if the contractor fails to pay the same [Madras Fertilisers Ltd V Controlling Authority 2003 LLR 244 Mad HC]

8. *Who will be the controlling authority for an establishment having branches in different states?*

If an establishment is having its branches in more than one state, the appropriate government will be Central Government.

For a company having branches in different States, the Controlling authority for claiming gratuity will be under Central Government [Rhone Poulenc (India) Ltd V Anjali Devrukhar 2005 LLR 799 Bom HC]

9. *Whether Gratuity has to be calculated on total gross wages of an employee?*

No. gratuity should be calculated only on Basic Wages and Dearness Allowance. HRA and other allowances are excluded for the purpose of calculation.

Neither the conveyance nor the site allowance will form part of wages for calculation of gratuity [Voltas Limited V Chandrakant Y Bhramhane, 2008 LLR 84 Bom HC]

'Personal allowance' and 'special compensatory allowance' are not wages for calculation of gratuity [SBI, Goa V Laxmikant Vithal Palekar 2011 LLR 133 Bom HC]

10. *Whether incentive or production bonus to be treated as 'Wages' for the purpose of calculation of Gratuity?*

No, Incentive payments or bonus, will not be wages for calculation of gratuity [TI Cycles of India, Ambattur V MK Gurumani 2002 LLR 57 SC]

11. How is the amount of gratuity payable determined?

Last drawn wages (Basic plus FDA plus VDA) divided by 26 and multiplied by 15 and then multiplied by number of years of service put in by the employee. Six month service and above rendered after completion of five years shall be treated as one year.

12. Is there any difference in calculation of gratuity for employees whose number of days working in a month are only 22 days?

No. There is no change. Even when an employee is working for 22 days in a month, his gratuity will be calculated on 26 days basis [Kone Elevators India Ltd V ACL-II Chennai, 2005 LLR 442 Mad HC]

13. An employee during his last month of service could not attend duties and earned less wage due his absence from duties. Thus, his last drawn wage is less than his normal wage rate. Whether the gratuity should be calculated on the last drawn reduced wages or on normal wage rate?

The words “fifteen days’ wages” are preceded by the words “at the rate of” and qualified by the words “based on the rate of wages last drawn” by the employee concerned. The emphasis is not what an employee would have earned in the course of fifteen days during the month when his employment was last terminated but on the rate of fifteen days’ wages for every completed year of service, based on the rate of wages last drawn by the employee concerned. Hence, the calculation should be based on the rate of wages and not on the actual wages earned in the last month of the service [Jeewan Lal (1929) Ltd V The Appellate Authority AIR 1984 SC 1842]

14. How many days gratuity is entitled by the seasonal employees?

Workers in the seasonal establishments are entitled to gratuity at the rate of 7 days wages for every completed year of service (season) [Malianan Coop Cane Development Union Ltd V Tej Ram Sharma, 2010 LLR 26 All HC]

The gratuity at the rate of seven days wages for each season has to be worked out. Then, the number of seasons in each completed year of service of the workman ie his continuous year of service, not regulated by calendar year should be worked out. In working for each season, the employee becomes entitled to gratuity at the rate of seven days wages per season [Asplinwall& Co V Lalitha Padugady 1995(71) FLR 855]

15. When an employee meets with death before completion of 5 years, whether his/her nominee / legal heir is entitled to receive gratuity?

Yes. The qualifying period of 5 years for entitlement of gratuity will not be applicable in case of death of an employee [AnathKumr Mishra V State of Chhattisgarh 2004–I LLJ 668 Chhatt HC]

If an employee is declared as total permanent disablement person before completion of five years of service, he will also be entitled to receive gratuity under the Act.

16. Is there any difference between establishments working six days a week and less than six days a week for the purpose of determination of 'continuous service' under the Act?

Yes. If an employee working in an establishment which works less than six days a week, he will be deemed in 'continuous service' of one year provided he actually worked for 190 days in the twelve months period.

In establishments working six days a week, employee will be deemed to have been in 'continuous service' provided he actually worked for 240 days in the twelve months period.

17. Whether the absence due to sickness etc., to be taken into account for computation of 240 days?

Absence due to sickness or accident should be treated as days worked for arriving the number of days worked for the purpose of computation of 240 days or 190 days.

An employee will be entitled to gratuity even for the year when he has not worked for 240 days in view of the amended definition of 'continuous service' whereby the service interrupted on account of sickness, accident etc., is to be included in allowing gratuity to an employee for the years during which he has not worked for 240 days [Korakundah Estate, Nilgiris V Sagunthala, 2004 LLR 222 Mad HC]

18. Whether unauthorised absence constitute break in service?

Unauthorised absence will not be the break in service for disentitlement of gratuity [PBM Polytext Ltd V Union of India 2012 LLR 1093 Guj HC]

19. Employee has not claimed his gratuity immediately after leaving the employment. Is there any limitation to claim gratuity by an employee subsequently?

There is no limitation for claiming gratuity by an employee since it is the obligation of the employer to give notice to the employee specifying his amount of gratuity [Transport Manager, Kolhapur Municipal Transport Undertaking V Pravin Bhabhutlal Shah (2005) LLR 503 Bom HC]

The Allahabad High Court in the matter of Kraft Palace V Appellate Authority [2013 LLR 254] held that it is the responsibility of the employer to pay gratuity and notify to the controlling authority.

However, the Karnataka High Court in one matter held that a claim for gratuity made after 13 years will not be tenable [Shivalingappa V Management of Minerva Mills 2001 LLR 734 Kar HC]

20. Whether a nominee is entitled to take the entire gratuity amount for herself/himself?

No. A nominee under Payment of Gratuity Act is a trustee of other legal heirs of the deceased and as such has no exclusive right over the amount accruing as gratuity [Gangubai Bhagwan Salawade V Chimanbai Suryabhan Salawale 2004 LLR 1066 Bom HC]

21. In the absence of nomination, in the event of death of an employee, to whom the gratuity should be paid?

In the case of those workman who have died, payment will have to be made to their heirs and the Labour Commissioner (authority under the Act) shall determine who the legal heirs are. In the case where heirship has to be ascertained, the time for payment shall be two months in place of one month [Agra Electricity Supply Co Ltd V 25 workmen 1987 (3) SCC 653]

22. Whether gratuity payable can be adjusted against loan taken by the employee?

No. Gratuity, as payable to an employee or his legal heir, cannot be adjusted against the loan. Yada Laxmi V The AP State Coop Bank, 2006 LLR 451 APHC

The Allahabad High Court in the matter of State of Bikaner & Jaipur V Appellate Authority [2013 LLR 637] held that gratuity can be adjusted towards loan if the agreement so provides.

23. Whether the employer is required to pay interest for delayed payment of gratuity?

Yes. If an employer fails to pay gratuity within 30 days from the date it became due, statutory interest will be payable [Pyare Mohan Prasad V RLC (C), Dhanbad, 2007 LLR 173 Jhar HC]

The Hon'ble HC of Delhi in the matter of KL Chandna V Punjab National Bank [2008 LLR 568] held that default in making timely payment of gratuity will attract 10% interest.

The Gujarat High Court in the matter of Tensile Steel Limited V Natwarsingh Udesingh Raj [2009 LLR 1223] held that interest over interest for delayed gratuity not proper on non-payment of gratuity.

24. Is there any protection provided to the gratuity under Act?

Yes. Gratuity payable under the Act shall not be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.

25. What are the consequences of non-payment of gratuity?

When an employer fails to pay gratuity within the prescribed period, the Magistrate can take cognizance [J Kumar V State of Jharkhand 2010 LLR (SN) 668 Jhar HC]

Prosecution of an employer for non-payment of gratuity will not be quashed [J Kumar V State of Jharkhand 2008 LLR 243 Jhar HC]

26. Can the gratuity be withheld on the grounds of pending criminal case or audit objection against the employee?

Mere pendency of criminal case against an employee who has retired from service will not be justifiable ground for an employer to withhold his gratuity [Gujarat SRTC V Devendrabhai Mulvantrai Vaidya 2004 LLR 225 Guj HC]

Gratuity of an employee cannot be withheld on his retirement on the plea that there have been audit objections which were never communicated to such employee [Jagdish Narain Chopra V Allahabad Dist Coop Bnk Ltd 2000 LLR 88 All HC]

Non-payment of gratuity to an employee on his retirement due to some lapses during service will not be justified when there is no termination on that account [BalachandraKrishnaji Kale V The KSRTC, 1999 LLR 242 Kar HC]

The Supreme Court in the matter of Mohammad Zaheeruddin Siddiqui V Executive Council AMU [2000 LLR 458] held that compensation of Rs. 50,000/- will be payable for withholding gratuity for three years.

27. When can gratuity be forfeited?

Forfeiture of gratuity can be done only when dismissed or terminated from the services for the prescribed misconducts under the Act [APSRTC V Amjad Ali Khan 2013 LLR 47 AP HC]

The misconducts committed during the course of employment which are prescribed under the Act are

- riotous or disorderly conduct or
- any other act of violence or
- any act which constitute an offence involving moral turpitude

Embezzlement will constitute moral turpitude and gratuity is to be forfeited on termination for moral turpitude [Madan Lal Sharma V H P Khadi and Village Industries Board, 2013 LLR 540 HP HC]

Gratuity cannot be forfeited in the absence of disciplinary proceedings holding the employee guilty of specified misconduct [Maharashtra SRTC, Mumbai V Maruti Ramchandra Mastud, 2011 LLR 397 Bom HC]

Gratuity of an employee dismissed for wilful slowing down of work cannot be withheld since there is no such bar in the Act [PermolliWallance Ltd V State of MP 1996 LLR 414 MP HC]

28. What are the consequences of non-payment of gratuity?

An employer who contravenes, or makes default in complying with, any of the provisions of this Act or any rules made thereunder shall be punishable with imprisonment for a term which shall not be less than three months, but which may extend to one year, or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.

When an employer fails to pay gratuity within the prescribed period, the Magistrate can take cognizance [J Kumar V State of Jharkhand 2010 LLR (SN) 668 Jhar HC]

Prosecution of an employer for non-payment of gratuity will not be quashed [J Kumar V State of Jharkhand 2008 LLR 243 Jhar HC]

29. *Can the gratuity be withheld on the grounds of pending criminal case or audit objection against the employee?*

Mere pendency of criminal case against an employee who has retired from service will not be justifiable ground for an employer to withhold his gratuity [Gujarat SRTC vs Devendrabhai Mulvantrai Vaidya 2004 LLR 225 Guj HC]

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The Supreme Court in the matter of Mohammad Zaheeruddin Siddiqui V Executive Council, AMU [2000 LLR 458] held that compensation of Rs. 50,000/- will be payable for withholding gratuity for three years.

30. *When can gratuity be forfeited?*

The gratuity of an employee, whose services have been terminated for any act of wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, can be forfeited to the extent of the damage or loss caused.

Further, gratuity payable to an employee may be wholly or partially forfeited on termination of services of the employee for the given below misconducts committed by him:

- riotous or disorderly conduct or
- any other act of violence or
- any act which constitute an offence involving moral turpitude

Forfeiture of gratuity can be done only when dismissed or terminated from the services for the prescribed misconducts under the Act [SAIL v The Controlling Authority under Payment of Gratuity Act & ALC Central 2017 LLR Cal HC]

Embezzlement will constitute moral turpitude and gratuity is to be forfeited on termination for moral turpitude [Madan Lal Sharma V H P Khadi and Village Industries Board, 2013 LLR 540 HP HC]

Gratuity cannot be forfeited:

Gratuity cannot be forfeited in the absence of disciplinary proceedings holding the employee guilty of specified misconduct [Maharashtra SRTC, Mumbai vs Maruti Ramchandra Mastud, 2011 LLR 397 Bom HC]

Gratuity of an employee dismissed for wilful slowing down of work cannot be withheld since there is no such bar in the Act [PermolliWallance Ltd V State of MP 1996 LLR 414 MP HC]

31. Can gratuity be forfeited without issuing show cause notice to the employee?

No. Before forfeiture of the gratuity, employee should be given an opportunity and a show cause should be issued stating the reasons for forfeiture of the gratuity.

The Bombay High Court [2017 LLR 564] in the matter of NanubhaiNichhabhai Desai V Dy. G M, UCO Bank held that Show cause notice is imperative for forfeiture of gratuity. In another matter, the Karnataka High Court [2014 LLR 1064] held that forfeiture of gratuity without show cause notice, will not be tenable.

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GST

INPUT TAX CREDIT

Contributed by CA Sri Harsha & CA Manindar

Important Definitions:

Section	Phrase	Definition
2(59)	<u>Input</u>	means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business.
2(19)	<u>Capital Goods</u>	means goods, the value of which is capitalised in the books of accounts of person claiming the input tax credit and which are used or intended to be used in course or furtherance of business.
2(60)	<u>Input Service</u>	means any service used or intended to be used by a supplier in the course or furtherance of business.
2(63)	<u>Input Tax Credit</u>	means the credit of input tax.
2(62)	<u>Input Tax</u>	In relation to a registered person, means the central tax, state tax, integrated tax or UT charged on supply of goods or services or both made to him and includes – <i>a)the integrated goods and services tax charged on import of goods b)the tax payable under the provisions of Section 9(3) and 9(4) c)the tax payable under the provisions of Section 5(3) and 5(4) of IGST d)the tax payable under the provisions of Section 9(3) and 9(4) of SGST e)the tax payable under the provisions of Section 7(3) and 7(4) of UGST</i> <i>But does not include the tax paid under composition levy.</i>
2(82)	<u>Output Tax</u>	In relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent <i>but excludes tax payable by him on reverse charge basis.</i>

Sec 16 – Eligibility and Conditions:

Section	Title	Covers
16	<u>Eligibility and Conditions for taking ITC</u>	<p>1. Every <i>registered person</i> shall subject to <i>such conditions and restrictions as may be prescribed</i> and in the manner specified in Section 49, be entitled to take ITC on any supply of goods or services or both to him which are used or intended to be used in course or furtherance of his business and the said amount shall be credited to electronic credit ledger.</p> <p>2. <i>Notwithstanding anything contained in this section,</i> no registered person <i>shall be entitled</i> to the credit of any input tax in respect of any supply of goods or services or both to him <i>unless -</i></p> <p>a) <i>he is in possession of tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying doc as may be prescribed (Rule 36 of CGST Rules, 17)</i></p>
16	<u>Eligibility and Conditions for taking ITC</u>	<p>2. <i>Notwithstanding anything contained in this section,</i> no registered person <i>shall be entitled</i> to the credit of any input tax in respect of any supply of goods or services or both to him <i>unless -</i></p> <p>b) <i>he has received the goods or services or both</i></p> <p><i>Explanation - For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on directions of such registered person, whether acting as agent or otherwise, before or during the movement of goods, either by way of transfer of docs of title to goods or otherwise;</i></p> <p>c) Subject to provisions of Section 41, the tax charged in respect of such supply has been actually paid to Government, either in cash or through utilisation of ITC admissible in respect of said supply</p>

Section	Title	Covers
16	<u>Eligibility and Conditions for taking ITC</u>	<p>2. <u>Notwithstanding anything contained in this section</u>, no registered person <u>shall be entitled</u> to the credit of any input tax in respect of any supply of goods or services or both to him unless -</p> <p><i>d) he has furnished the return under Section 39</i></p> <p><i>Provided that where goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon the receipt of last lot or instalment.</i></p> <p><i>Provided further that where a recipient fails to pay supplier of goods or services or both, other than supplies on which tax is payable on reverse charge basis, the amount towards value of supply along with tax payable thereon within a period of 180 days from date of issue of invoice by supplier, an amount equal to ITC availed by recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed (Rule 37 of CGST Rules, 17)</i></p>
16	<u>Eligibility and Conditions for taking ITC</u>	<p>2. <u>Notwithstanding anything contained in this section</u>, no registered person <u>shall be entitled</u> to the credit of any input tax in respect of any supply of goods or services or both to him <u>unless</u> -</p> <p><i>Provided also that the recipient shall be entitled to avail credit of input tax payment made by him of the amount towards value of supply of goods or services or both along with tax payable thereon.</i></p> <p>3. Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of Income Tax Act, 1961, the input tax credit on said tax component shall not be allowed.</p> <p>4. A registered person shall not be entitled to take ITC in respect of any invoice/debit note for supply of goods/services/both after due date of furnishing the return under Section 39 for month of Sept following the end of FY to which such invoice/debit note pertains or furnishing of relevant annual return, whichever is earlier.</p>

Sec 17 – Apportionment and Blocked:

Section	Title	Covers
17	<u>Apportionment of Credit and Blocked Credits</u>	<ol style="list-style-type: none"> 1. Where goods/services/both used by registered person partly for purposes of any business and partly for other purposes, the amount of credit <u>shall be restricted to so much of the input tax as is attributable to purposes of his business.</u> 2. Where goods/services/both used by registered person partly for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies, amount of credit shall be restricted to so much of input tax as is attributable to the said taxable supplies including zero rated supplies. 3. The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which recipient is liable to pay tax under RCM, transactions in securities, sale of land subject to Para 5(b) of Schedule II, sale of building (<i>Rule 42 of CGST Rules, 17 – Inputs & Input Services</i>) & (<i>Rule 43 of CGST Rules, 17- Capital Goods</i>)
17	<u>Apportionment of Credit and Blocked Credits</u>	<ol style="list-style-type: none"> 4. A banking company or a financial institution including NBFC, engaged in supplying services by way of accepting deposits, extending loans or advances shall have option to either comply with provisions of sub-section (2), or avail of, every month, an amount equal to 50% of eligible input tax credit on inputs, capital goods and input services in that month and the rest shall lapse. Option once exercised applies for entire FY. Provided further that restriction of 50% shall not apply to tax paid on supplies made by one registered person to another registered person having the same PAN (<i>Rule 38 of CGST Rules, 17</i>) 5. <u>Notwithstanding anything contained in Section 16(1) and 18(1), input tax credit shall not be available in respect of the following namely –</u> <ol style="list-style-type: none"> a) Motor Vehicles and other conveyances except when they are used – <ol style="list-style-type: none"> I. For making taxable supplies, namely – <ol style="list-style-type: none"> A. Further supply of such vehicles or conveyances or B. Transportation of passengers or C. Imparting training on driving, flying, navigating such vehi/conve ii. Transportation of goods

Section	Title	Covers
17	<u>Apportionment of Credit and Blocked Credits</u>	<p>5. <u>Notwithstanding anything contained in Section 16(1) and 18(1), input tax credit shall not be available in respect of the following namely–</u></p> <p>b) The following supply of goods or services or both–</p> <ol style="list-style-type: none"> i. Food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both as an element of a taxable composite or mixed supply ii. membership of a club, health and fitness centre iii. Rent-a-cab, life insurance and health insurance except where – <ol style="list-style-type: none"> A. the government notifies the services which are obligatory from an employer to provide to its employees under any law for time being in force B. such inward supply of goods/services/both of a particular category is used by registered person for making an outward supply of same category of goods/services/both/as part of taxable composite/mixed supply
17	<u>Apportionment of Credit and Blocked Credits</u>	<p>5. <u>Notwithstanding anything contained in Section 16(1) and 18(1), input tax credit shall not be available in respect of the following namely–</u></p> <ol style="list-style-type: none"> iv. Travel benefits extended to employees on vacation such as leave or home travel concession c) works contract services when supplied for construction of an immovable property (other than plant or 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. <p>Explanation – for the purposes of clause (c) and (d), the expression ‘construction’ includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to said immovable property</p>

Section	Title	Covers
17	<u>Apportionment of Credit and Blocked Credits</u>	<p data-bbox="641 374 1432 484">5. <u>Notwithstanding anything contained in Section 16(1) and 18(1), input tax credit shall not be available in respect of the following namely–</u></p> <ul style="list-style-type: none"> <li data-bbox="686 530 1432 599">e) goods or services or both on which tax has been paid under Section 10 <li data-bbox="686 606 1432 675">f) goods or services or both received by a NR taxable person except import of goods <li data-bbox="686 681 1432 750">g) goods or services or both used for personal consumption <li data-bbox="686 757 1432 826">h) goods lost, stolen, destroyed, written off or disposed by way of gift/free samples <li data-bbox="686 833 1432 867">l) Any tax paid in accordance with Section 74, 129 and 130. <p data-bbox="641 913 1432 1131">Explanation – For purposes of this chapter, 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 –</p> <ul style="list-style-type: none"> <li data-bbox="686 1177 1243 1212">i. Land, building or any other civil structure <li data-bbox="686 1219 1076 1253">ii. Telecommunication towers <li data-bbox="686 1260 1260 1294">iii. Pipelines laid outside the factory premises

Sec 18 – Availability of Credit in Special Circumstances

Section	Title	Covers
18	<u>Availability of Credit in special circumstances</u>	<p>1. Subject to such conditions and restrictions as may be prescribed –</p> <p>a) a person who has applied for registration within 30 days from date on which he becomes liable for 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 day immediately preceding the date from which he becomes liable to pay tax under provisions of the act.</p> <p>b) a person who takes registration under Section 25(3) 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 day immediately preceding the date of grant of registration.</p> <p>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 and inputs contained in semi-finished or finished goods held in stock and on capital goods on day immediately preceding the date from which he becomes liable to pay tax under Section 9. Provided credit on capital goods shall be reduced by such percentage points as may be prescribed.</p> <p>d) Where an exempt supply of goods/services/both by a registered person becomes a taxable supply, such person 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 relating to such exempt supply and on capital goods exclusively used for such exempt supply on the day immediately preceding the date from which such supply becomes taxable. Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed.</p>

Section	Title	Covers
18	<u>Availability of Credit in special circumstances</u>	<ol style="list-style-type: none"> <li data-bbox="639 383 1432 534">2. A registered person shall not be entitled to take ITC under sub-section (1) in respect of supply of goods or services or both to him after the expiry of 1 year from the date of issue of tax invoice relating to such supply. <li data-bbox="639 576 1432 879">3. Where there is a change in constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of business with specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer ITC which remains unutilised in his ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed. <li data-bbox="639 920 1432 1412">4. Where any registered person who has availed ITC opts to pay tax under Section 10 or where goods/services/both supplied by him become wholly exempt, he shall pay an amount, by way of debit in electronic credit ledger or electronic cash ledger, equivalent to credit of input tax in respect of inputs held stock in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods, reduced by such percentage points as may be prescribed, on day immediately preceding date of exercising of such option or, as the case maybe, date of such exemption. Provided that after payment of such amount, the balance of input tax credit, if any, lying in his electronic ledger shall lapse. <li data-bbox="639 1453 1432 1526">5. The amount of credit under 18(1) and 18(4) shall be in manner specified as Rule 44 of CGST Rules, 17 <li data-bbox="639 1568 1432 1793">6. In case of supply of capital goods or P&M, on which ITC has been taken, the registered person shall pay an amount equal to ITC taken on said capital goods or P&M reduced by such percentage points as may be prescribed or TC of such capital goods or P&M determined under Section 15, whichever is higher [same as specified in Rule 44].

Sec 19 – Taking ITC in respect of Inputs & CG –JW

Section	Title	Covers
19	<u>Taking ITC in respect of inputs & capital goods sent for Job Work</u>	<ol style="list-style-type: none"> 1. The principal shall, subject to such conditions and restrictions as may be prescribed, be allowed ITC on inputs/CG sent to a job-worker for job-work. 2. Notwithstanding anything contained in Section 16(2)(b), the principal shall be entitled to take ITC on inputs/CG even if inputs are directly sent to job worker for job work without being first brought to his place of business. 3. Where inputs sent for job work are not received back by principal after completion of job work or otherwise are not supplied from place of business of job worker in accordance with Section 143(1)(b) within 1 year (inputs)/3 years (CG) of being sent out, it shall be deemed that such inputs had been supplied by principal to job worker on day when the said inputs/CG were sent out. Provided that where inputs are sent directly to a job worker, the period 1/3 year shall be counted from date of receipt of inputs by job worker. 4. Where inputs or capital goods are not returned to principal within time stipulated in Section 143, it shall be deemed that such inputs or capital goods had been supplied by principal to JW on day when such inputs/capital goods were sent out and said supply shall be declared in GSTR-1 and principal shall be liable to pay tax along with interest – Rule 45(4) of CGST Rules, 17.

Sec 20 – Manner of Distribution of Credit by ISD

Section	Title	Covers
20	<u>Manner of Distribution of Credit by ISD</u>	<p>1. ISD shall distribute the credit of CT as CT/IT, IT as IT/CT, ST as ST/IT and IT as IT/ST by way of issue of document containing the amount of input tax being distributed in such manner as may be prescribed.</p> <p>2. The ISD may distribute credit subject to following conditions–</p> <ol style="list-style-type: none"> a) credit can be distributed to recipients of credit against a doc containing such details as may be prescribed b) amount of credit distributed shall not exceed the amount of credit available for distribution c) credit of tax paid on input service attributable to a recipient of credit shall be distributed only to that recipient d) credit of tax paid on input services attributable to more than one recipient of credit shall be distributed amongst such recipients to whom input service is attributable and such distribution shall be pro rata on basis of turnover in a state of such recipient, during relevant period, to aggregate of turnover of all such recipients to whom such input service is attributable and which are operational in current year, during the said relevant period. e) Credit of tax paid on input services attributable to all recipients of credit shall be distributed amongst such recipients and such distribution shall be pro rata on basis of turnover in a state of such recipient, during relevant period, to aggregate of turnover of all recipients and which are operational in current year, during said relevant period. <p>Explanation–</p> <ul style="list-style-type: none"> • Relevant period– <ul style="list-style-type: none"> • If recipients of credit have turnover in state in FY preceding the year during which credit is to be distributed, said FY • If some or all recipients of credit do not have turnover in their states in FY preceding the year during which credit is distributed, last quarter for which details of such turnover of all recipients are available, previous to the month during which credit is distributed

Recovery of Credits:

Section	Title	Covers
21	<u>Manner of Recovery of Credit distributed in excess</u>	Where the ISD distributes the credit in contravention to Section 20 resulting in excess of distribution of credit to one or more recipients of credit, the excess credit so distributed shall be recovered from such recipients along with interest and provisions of Section 73 or Section 74 , as the case may be mutatis mutandis apply for determination of amounts to be recovered.
73	<u>Determination of ITC wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts</u>	<ol style="list-style-type: none"> 1. Where it appears to proper officer that ITC has been wrongly availed or utilised for any reason, other than reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on person who has wrongly availed or utilised ITC, requiring him to show cause why he should not pay amount specified in notice along with interest and penalty. 2. The proper officer, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to 10% or 10,000 whichever is higher, due from such person and issue an order. 3. The proper officer shall issue above order within 3 years from the due date for furnishing of annual return for FY to which ITC wrongly availed or utilised relates.
74	<u>Determination of ITC wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts</u>	<ol style="list-style-type: none"> 1. Where it appears to proper officer that ITC has been wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on person who has wrongly availed or utilised ITC, requiring him to show cause why he should not pay amount specified in notice along with interest and penalty equivalent to tax specified in notice. 2. The proper officer, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty due from such person and issue an order. 3. The proper officer shall issue above order within 5 years from the due date for furnishing of annual return for FY to which ITC wrongly availed or utilised relates.

Section 54 - Refunds: Refunds

Section	Title	Covers
54	<u>Refunds</u>	<p>1. Any person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, make an application before expiry of 2 years from relevant date in such form and manner as may be prescribed.</p> <p>2. A registered person may claim refund of any unutilised input tax credit at end of any tax period. Provided that no refund of unutilised input tax credit shall be allowed in cases other than –</p> <p style="margin-left: 20px;">i. Zero rated supplies made without payment of tax</p> <p style="margin-left: 20px;">ii. Where credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies, except supplies of goods or services or both as may be notified by Govt</p> <p>Provided further no refund of unutilised ITC shall be allowed in cases where goods are exported out of India which are subject to export duty.</p> <p>Provided also no refund of ITC shall be allowed, if supplier of goods/services/both avails of drawback in respect of CT or claims refund of IT on such supplies.</p>

Sec 49(5) – Manner of Utilization:

Section	Title	Relevant Sub-Section
49	<u>Payment of Tax, Interest, Penalty and other amounts</u>	<p>5. The amount of input tax credit available in the electronic credit ledger of registered person on account of –</p> <p style="margin-left: 20px;">a) IT shall first be utilised towards payment of IT and amount remaining, if any, may be utilised towards the payment of CT and ST, or as the case may be, UT, in that order</p> <p style="margin-left: 20px;">b) CT shall first be utilised towards payment of CT and the amount remaining, if any, may be utilised towards payment of IT</p> <p style="margin-left: 20px;">c) ST shall first be utilised towards payment of ST and amount remaining, if any, may be utilised towards payment of IT</p> <p style="margin-left: 20px;">d) CT shall not be utilised towards payment of ST or UT and</p> <p style="margin-left: 20px;">e) ST or UT shall not be utilised towards payment of CT.</p>

Rule 36 – Documentary Requirements and Conditions:

Section	Title	Deals with
36	<u>Documentary Requirements and Conditions for claiming ITC</u>	<ol style="list-style-type: none"> 1. The input tax credit shall be availed by a registered person on basis of invoice/challan for RCM/Debit Note/BOE in case of imports/ISD Invoice/ISD credit note. 2. ITC shall be availed by a registered person only if all applicable particulars as specified in Chapter VI are contained in said doc, and relevant information, as contained in said doc, is furnished in GSTR-2 by such person. 3. No Input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of fraud, willful misstatement or suppression of facts.

Rule 37 – Reversal of ITC:

Section	Title	Deals with
37	<u>Reversal of ITC in case of non-payment of consideration</u>	<ol style="list-style-type: none"> 1. A registered person who has availed ITC but fails to pay to the supplier, the value of supply along with tax payable, within 180 days, shall furnish the details of such supply, amount of value not paid and amount of ITC availed of proportionate to such amount not paid to supplier in GSTR-2 for the month immediately following period of 180 days. Provided that the value of supplies made without consideration as specified in Schedule I shall be deemed to have been paid for purposes of second proviso to Section 16(2). 2. The amount of ITC specified above, shall be added to output tax liability of registered person for month in which details are furnished. 3. The registered person shall be liable to pay interest in terms of Section 50(1) for period starting from 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). 4. The time limit specified in Section 16(4) shall not apply to a claim for re-availing of any credit, in accordance with provisions of this act or provisions of this chapter, that has been reversed earlier.

Rule 42 – Manner of Distribution – Input/Input Services:

Section	Title	Deals with
42	<u>Manner of distribution of ITC in respect of input or input services and reversal thereof</u>	<p>The manner for determining reversal of credit as specified in Section 17(1) and 17(2) is as under:</p> <p><u>Total Credit:</u></p> <ul style="list-style-type: none"> • Total ITC involved on inputs and input services in a tax period = T <p><u>Eliminate Exclusive Credits for Exempted & Ineligible Credits:</u></p> <ul style="list-style-type: none"> • ITC exclusively used for purposes other than business = T1 • ITC exclusively used for purposes of exempted supplies = T2 • Amount of ITC on which credit is not allowed as per 17(5) = T3 • Amount of ITC credited to credit ledger = C1 = T – (T1 + T2 + T3) <p><u>Identify Exclusive Credits for Taxable Supplies:</u></p> <ul style="list-style-type: none"> • ITC exclusively used for taxable supplies = T4 <p><u>Arrive at Common Credits:</u></p> <ul style="list-style-type: none"> • Common Credits = C2 = C1 – T4 <p><u>Arrive at Common Credits pertaining to Exempt Supplies:</u></p> <ul style="list-style-type: none"> • Amount of common ITC towards exempt supplies = D1 = E/F * C2 E = Aggregate value of exempt supplies during tax period F = Total turnover in the state of registered person during tax period <p><u>Arrive at Common Credits pertaining to Other than business purposes:</u></p> <ul style="list-style-type: none"> • Amount of common ITC towards non-business = D2 = 5% * C2 <p><u>Identify Common Credits for business purposes and Taxable Supplies:</u></p> <ul style="list-style-type: none"> • Amount of common ITC for taxable and business purposes = C3 = C2 – (D1+D2) <p><u>Adding D1 & D2 to output tax liability for the tax period:</u></p> <ul style="list-style-type: none"> • D1 and D2 shall be added to output tax liability and to be checked with final turnovers.

Section	Title	Deals with																																																																																				
42	<u>Manner of distribution of ITC in respect of input or input services and reversal thereof</u>	<p>The ITC determined under sub-rule (1) shall be calculated finally for financial year before the due date of furnishing of return for month of September following the end of financial year to which such credit relates, in manner specified as under:</p> <ul style="list-style-type: none"> If the final D1 and D2 are greater than provisional D1 and D2, then such excess D1 and D2 shall be added to output tax liability in month not later than month of September following the end of financial year to which such credit relates and said person shall be liable to pay interest on said amount in terms of Section 50(1) starting from first day of April of succeeding financial year till date of payment If the final D1 and D2 are lesser than the provisional D1 and D2, such excess D1 and D2 shall be claimed as credit by registered person in his return for month not later than the month of September following end of FY to which such credit relates. <table border="0"> <tr> <td colspan="4">Total Credits</td> </tr> <tr> <td>Credit on Inputs & Input Services</td> <td>T</td> <td></td> <td>15,00,00</td> </tr> <tr> <td colspan="4">Elimination of Ineligible & Exempt Credit</td> </tr> <tr> <td>Exclusively used for Non-Business</td> <td>T1</td> <td></td> <td>1,00,00</td> </tr> <tr> <td>Exclusively used for Exempt</td> <td>T2</td> <td></td> <td>3,00,00</td> </tr> <tr> <td>Ineligible under Sec 17(5)</td> <td>T3</td> <td></td> <td>75,00</td> </tr> <tr> <td colspan="4">Credit allowed in Ledger</td> </tr> <tr> <td>ITC credited to ledger</td> <td>C1</td> <td>T - (T1+T2+T3)</td> <td>10,25,00</td> </tr> <tr> <td colspan="4">Credit Exclusively used for Taxable Supply</td> </tr> <tr> <td>Exclusively used</td> <td>T4</td> <td></td> <td>3,25,00</td> </tr> <tr> <td colspan="4">Common Credits both for Taxable & Exempted</td> </tr> <tr> <td>Common ITC</td> <td>C2</td> <td>C1- T4</td> <td>7,00,00</td> </tr> <tr> <td colspan="4">Common Credits for Exempted & Non-Business</td> </tr> <tr> <td>Common ITC for Exempted</td> <td>D1</td> <td>E/F * C2</td> <td>1,86,66</td> </tr> <tr> <td>Common ITC for Non-Business</td> <td>D2</td> <td>5%*C2</td> <td>35,00</td> </tr> <tr> <td colspan="4">Common Credits for Taxable</td> </tr> <tr> <td>Common ITC for Taxable</td> <td>C3</td> <td>C2-(D1+D2)</td> <td>4,78,33</td> </tr> <tr> <td colspan="4">Addition to Output Tax Liability</td> </tr> <tr> <td>To be added to Output Tax</td> <td></td> <td>D1+D2</td> <td>2,21,66</td> </tr> <tr> <td colspan="4">Net Credit Allowed for tax period</td> </tr> <tr> <td>ITC allowed</td> <td></td> <td>C1-(D1+D2)</td> <td>8,03,33</td> </tr> </table>	Total Credits				Credit on Inputs & Input Services	T		15,00,00	Elimination of Ineligible & Exempt Credit				Exclusively used for Non-Business	T1		1,00,00	Exclusively used for Exempt	T2		3,00,00	Ineligible under Sec 17(5)	T3		75,00	Credit allowed in Ledger				ITC credited to ledger	C1	T - (T1+T2+T3)	10,25,00	Credit Exclusively used for Taxable Supply				Exclusively used	T4		3,25,00	Common Credits both for Taxable & Exempted				Common ITC	C2	C1- T4	7,00,00	Common Credits for Exempted & Non-Business				Common ITC for Exempted	D1	E/F * C2	1,86,66	Common ITC for Non-Business	D2	5%*C2	35,00	Common Credits for Taxable				Common ITC for Taxable	C3	C2-(D1+D2)	4,78,33	Addition to Output Tax Liability				To be added to Output Tax		D1+D2	2,21,66	Net Credit Allowed for tax period				ITC allowed		C1-(D1+D2)	8,03,33
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Credit Exclusively used for Taxable Supply																																																																																						
Exclusively used	T4		3,25,00																																																																																			
Common Credits both for Taxable & Exempted																																																																																						
Common ITC	C2	C1- T4	7,00,00																																																																																			
Common Credits for Exempted & Non-Business																																																																																						
Common ITC for Exempted	D1	E/F * C2	1,86,66																																																																																			
Common ITC for Non-Business	D2	5%*C2	35,00																																																																																			
Common Credits for Taxable																																																																																						
Common ITC for Taxable	C3	C2-(D1+D2)	4,78,33																																																																																			
Addition to Output Tax Liability																																																																																						
To be added to Output Tax		D1+D2	2,21,66																																																																																			
Net Credit Allowed for tax period																																																																																						
ITC allowed		C1-(D1+D2)	8,03,33																																																																																			

Rule 43 – Manner of Distribution – Capital Goods:

Section	Title	Deals with
43	<u>Manner of distribution of ITC in respect of Capital Goods and reversal thereof</u>	<p>The manner for determining reversal of credit as specified in Section 17(1) and 17(2) is as under:</p> <p>a) Credit of ITC in respect of CG used exclusively for non-business or exempted supplies shall not be taken in credit ledger</p> <p>b) Credit of ITC in respect of CG used exclusively for effecting supplies shall be taken in credit ledger</p> <p>c) Amount of ITC in respect of CG not covered above, demoted as 'A', shall be credited to credit ledger and useful life of goods shall be taken as 5 years from date of invoice for such goods</p> <p>d) The aggregate of amounts 'A' credited to ledger under clause (c) to be denoted as T_c, shall be common credit in respect of capital goods for a tax period</p> <p>e) The amount of ITC attributable to a tax period on common capital goods during their useful life, be denoted as T_m and calculated as – $T_m = T_c/60$</p> <p>f) The amount of ITC, at the beginning of a tax period, on all common capital goods whose useful remains during tax period, be denoted as T_r and shall be aggregate of T_m for all such capital goods</p> <p>g) The amount of common credit attributable towards exempted supplies, be denoted $T_e = (E/F) * T_r$</p> <p>E = Aggregate value of exempt supplies during tax period F = Total turnover in the state of registered person during tax period</p> <p>h) The amount of T_e along with applicable interest shall, during every tax period of the useful life of concerned capital goods, be added to output tax liability of person making such claim of credit.</p>

Rule 38 – Claim of Credit by Bank/FI/NBFC:

Section	Title	Deals with
38	<u>Claim of Credit by a Banking Company or a Financial Institution</u>	<p>1. A banking company or a FI (including NBFC), engaged in supply of services by accepting deposits or extending loans or advances that chooses not to comply with Section 17(2), they can follow the procedure namely –</p> <ul style="list-style-type: none"> • said company/institution shall not avail credit of – <ul style="list-style-type: none"> • tax paid on input and input services that are used for non-business purposes • credit attributable to supplies specified in 17(5) • said company or institution shall avail the credit of tax paid on inputs and input services referred to in the second proviso to Section 17(4) and not covered under 17(5) or 17(1) • 50% of remaining amount of input tax shall be input tax credit admissible to the company or institution and shall be furnished in GSTR-2.

Rule 44 – Manner of Reversal of Credit:

Section	Title	Deals with
44	<u>Manner of Reversal of Credit under Special Circumstances</u>	<p>The amount of ITC relating to inputs held in stock, input contained in semi-finished and finished goods held in stock, and capital goods held in stock shall, for purposes of Section 18(4), be determined in the following manner, namely –</p> <ol style="list-style-type: none"> a) For inputs held in stock and inputs contained in semi-finished goods held in stock, the ITC shall be calculated proportionately on basis of corresponding invoice on which credit has been availed by registered taxable person on such inputs b) For Capital Goods held in stock, the ITC involved in remaining useful life in months shall be computed on pro-rata basis, taking useful life as 5 years.

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AUDIT

THE MANY SIDES OF RISK

Contributed by CA Sandeep Das |

What is Fundamental Risk

Fundamental risk is the risk that the business's fundamentals are degrading or about to degrade. If you see sales declining or the company is selling an outdated product, you need to stay away from this company. Increasing debt and an eroding cash position are other danger signs.

Over time, organizations have created a plethora of functions that manage business risks from their own point of view.

Researchers look at risk by product or market life cycle. For example, missing customer needs, mistakes in product design, poor messaging, insufficient trial or repeat purchases, product extensions, upgrades, and delays in discontinuing a product are all risks that product managers routinely face. Mathematically, a key formula is “expected value of perfect information.”

Product managers are constantly asking themselves, “What is the risk (probability) of missing an insight if we don’t invest more in research?”

Strategy and Competitive Analysis

Strategic professionals look at risk in stark terms, the potential of having business value diminished by failing to understand dynamics in competitors, customers, and products (including substitutions). They are constantly asking, “What am I missing?” and looking for ways to overcome structural blindness. For strategists, the risk that springs from change creates opportunity. Taking risk and managing it better than competitors is the ultimate competitive differentiator.

Financial management - A central responsibility of finance is to allocate capital to the best investments. Two frequently used formulas for guiding these investment decisions are net present value (NPV) and options modeling. NPV is the more popular of the two. The numerator in the NPV formula is the risk-adjusted return of a proposed investment. The denominator is the overall or average risk-adjusted cost of capital to a business or business line. Both the proposed investment and average NPV include the time value of money. If the proposal’s return is better than the average, the decision criterion is to fund the project. Options’ modeling extends NPV by breaking an initiative into phases. At each phase, the question is asked, “What is the probability that the value of the business options for action created by funding the initiative is greater than the cost of funds?”

Operations management - Operations managers use a huge tool kit of risk-balancing equations. One of the most basic equations is the “economic order quantity” (EOQ), which centers on stock-out risk. For example, if too much of a perishable product is ordered, it expires and is wasted. If too little is ordered, sales opportunities are lost. To calculate the EOQ given risk, this formula includes factors such as delivery time, cost of capital, and cost of storage space. Bar code check-outs have become important because they provide more precise data to calculate EOQ to manage stock-out risk.

Marketing execution and Sales management “What will be the year, quarter, month, week, and day-end sales?” This is the critical question from marketing and sales managers. Forecasting is vital to allocating marketing and sales resources as well as ordering the right quantities of the right products for the right locations. A key risk management method is analysis of the marketing-sales funnel. In the new world of online sales, “clicks” funnel stages include people aware of a product, aware of a seller, visiting a website, clicking around, putting a product in a shopping cart, ordering, ordering again, and telling their friends. Today’s forecasts are cascades of probabilistic equations tracking the clicks through online shopping chains.

Human Resources Hiring and resource planning, from the initial job posting to the interview and selection process, is about risk management. What’s the risk a job candidate won’t perform as expected? Reducing this risk is the reason organizations engage expensive consultants to conduct personality surveys, emphasize employee benefits and retirement plans, and create on-boarding plans.

Quality management Quality and risk are closely related. Quality is about the probability that products will meet expectations. Risk is about the probability of a defective product.

The Common Thread

For all their differences, these business disciplines share many risk-related concepts and assumptions. A common thread running through their risk management processes relates to the use of mathematical concepts, which have been refined over many decades. For all of them, math based on probabilities is central to managing risk. Other common ground includes:

- Managing risk is needed to enable taking risk; sometimes huge risk to achieve objectives. Risk resides in a dynamic world of change, complexity, and fatigue. These are the three catalysts of risk.
- Each process requires an appreciation of systems; interconnectedness, and the need to understand deep root causes and process interactions. Asking “what if?” with scenario analysis is the heart of managing risk.
- Decisions seek to optimize risk and return.
- The roots of risk management are millennia old. In short, appropriate risk mathematical and management methods matter. Internal auditors, while rotating their focus from one part of the organization to another, can observe and learn from each role’s math and methods.

Cross-pollinating Risk

By learning from the risk methods in each business area, internal auditors can help cross-pollinate risk methods across the organization. Opportunities to cross-pollinate include bridging strategy and finance through the options modeling approach, smoothing the flow of risk math from all business areas into the risk calculation used inside options models or NPV, streaming together the quality improvement and sales risk analyses to make it more likely that quality will be free of cost, and encouraging teams to come together in scenario analysis workshops to more easily achieve shared business objectives. Each bridge built could become financial value created and personal trust earned.

Role of Board in Enterprise Risk Management

The board's job is to oversee the enterprise risk management process, to make sure measures are in place to identify risks, to get the right reporting, to bring insight from the directors' own experiences, and to participate in dialogue with management about strategies to address the issues. Risk is too big for any one committee. Traditionally it has been the purview of the audit committee; however, adding oversight for the entire organization's risk profile would overwhelm the committee's already heavy agenda. Although we still see a number of companies placing risk oversight squarely on the audit committee.

*This article is contributed by CA Sandeep Das, Partner of SBS and Company LLP, Chartered Accountants.
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An overview of the EOU scheme by - Manindar



FEMA FDI Regulations - CA Murali Krishna G



Input Tax Credit under GST- Part -II - CA Harsha



Input Tax Credit under GST- Part -III - CA Harsha



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