

**Introduction**

The Input Tax Credit (ITC) has been the most vexed issue under the GST law, with debates on issues of cascading not properly addressed in the present scheme of law. The provisions relating to ITC have already witnessed multiple amendments, including retrospective modifications.

This trend seems to have been continued in Union Budget 2023-24 proposals.

**ITC & return filing by vendors**

Proposals have been made to allow taxpayers to file GSTR1 & 3B returns latest within three years from the original due date. This aspect bears relevance to the extent that the ITC eligibility on procurement is qualified by (a) requirement of vendor reporting transactions in its GSTR1 returns; as well as (b) tax payment on same.

The limitation casted on return filing action would have a bearing on cases, where either the vendor is not traceable or its compliances are not timely. The limitation period of 3 years, if missed could lead to a permanent loss of ITC.

**CSR expenses**

The Corporate Social Responsibility spends by corporates garners a lot of attention sadly including from tax perspective. Availment of GST input tax credit (ITC) on such expenses has been marred by uncertainty given that it involves legal obligation on one hand and effective free distribution of goods & services on the other. Previously, an omnibus exclusion of goods given away as gift was ineligible for ITC. Industry took varied interpretation around this aspect and some assertively held that mandatory CSR expenditure is not a gift since it is done under an obligation laid down by the Companies Act. Hence, ITC in such a scenario shall be eligible. In case of procurement of goods, voluntary (over and above the mandatory limit) CSR expenses may qualify as gift since it is not done under an obligation.

Contradictory advance rulings were pronounced on the subject, including favorable advance rulings by Uttar Pradesh authorities (in case of Dwarikesh Sugar) and Telangana authorities (in case of Bambino Pasta).

Whereas now a proposal has been introduced to restrict ITC on goods or services received for use for activities relating obligations under CSR as referred in Sec. 135 of the Companies Act.

This comes in as a significant blow to the industry, as it inflates CSR spend by the rate of tax applicable on relevant procurements (typically in range of 12-18%) thereby reducing the funds available/ allocated for actual CSR spend. The proposition is also contrary to certain other ITC restrictions, where an exception to statutory obligations has been given such as in case of food & beverages, travel, health related expenses, etc

**ELP's Insights**

The proposal if made into law could trigger litigation on constitutional validity of such legal provisions primarily on grounds of equality (as certain other legal obligation are exceptions for ITC restrictions) as well as economic hardship imposed.

In any case, since the end-use is CSR, the imposition of restriction is a retrograde step.

Also, the proposal appears prospective in nature. On that basis, a clear view could be taken that such restriction was *hitherto* not applicable.

Lastly, from a Companies Act standpoint, it would be interesting to examine whether GST paid on relevant procurements could be considered towards mandatory CSR spend requirements.

While the amendment may not have real impact on bottom-line of Companies, the effective spend towards CSR may go down due to inclusion of GST amount towards 'CSR expense' under Section 135 of Companies Act, 2013.

**ITC reversals on sale of warehoused goods**

Another significant proposal relates to value of 'exempt supply' for purposes of quantifying the ITC reversal requirement on account of exempt (including non-taxable) outward supplies.

It is proposed that value of supply of warehoused goods supplied before clearance for home consumption (which otherwise is a Schedule III transaction i.e. one qualifying neither as supply of goods nor that of services), should be included in value of "exempt supply" for computing ITC reversals.

This proposal attempts to overturn the decision of Bombay High Court in case of **Sandeep Patil vs UOI [2019 (31) GSTL 398]** and Kerala High Court in case of **CIAL Duty Free &**

**Retail Services Limited [2020 (42) GSTL 481]**, wherein it was held that supply of warehoused goods on the outward side would present a case for eligibility of ITC on corresponding procurements. Further, where such suppliers are the likes of 'duty free shops', etc, the courts also opined that the same would be eligible for refund of accumulated ITC.

The amendment would net net increase the cost of making supplies from warehouse before custom clearances.

#### ELP's Insights

Treating supply of warehoused goods as 'exempt supply' for purposes of reversals would effectively send the cost of exports & warehousing business soaring or to say result in indirectly exporting domestic taxes contrary to stated Gol policy.

While India aims to be amongst the leading warehousing hub jurisdictions globally, this provision would significantly alter viability & value proposition concerning the same.

It is anticipated that representations would be made to cure this effect and restore status quo.

#### ITC reversals on account of non-payment to domestic vendors

The GST schema provides that a supplier of outward services can avail ITC on goods and services it procures, provided that it also pays the corresponding vendors within 180 days from the invoice date.

In case, where the payment is not made or delayed beyond the statutory prescription of 180 days, the scenario presently warrants that the ITC amount so availed is added to supplier's 'output liability' and be payable along with interest as may be prescribed.

The precarious language under Sec. 16 of the CGST Act, 2017 read with CGST Rules (rule 37 precisely, as amended from time to time) led, a general retort that substantive provisions for creating such a liability as well as imposing interest on same are not legally sacrosanct or sustainable. Accordingly, there is litigation in some pockets of the country regarding liability of tax and more particularly legality of imposing interest in these cases.

The Budget 2023 proposal attempts to simplify the contours of the relevant legal provisions to simply provide a substantive mechanism of liability creation in such case i.e. *such amount shall be paid by supplier with interest under Section 50* of the CGST Act.

#### ELP's Insights

The amendment, to be implemented from a notified date, is expected to address legal challenges to existing scheme & provisions on the subject matter.

Though adverse to a taxpayer's interest, the amendment is likely to bring certainty, which is welcome.

However, with such position being enacted prospectively, the past is exposed to further more challenges on both liability creation as well as interest imposition thereupon, and taxpayers shall use the prospectivity of amendments to argue the legislative lacunae or loopholes in the past.

