

## Circular cannot override statutory provisions, cumulative ITC adjustment allowed for the period February - August 2020 – Allahabad HC

19 October 2023



## Summary

The Allahabad High Court (HC) has set aside a demand order of approximately INR 235 crores towards excess ITC for the period between February and August 2020. The HC held that the computation of the eligible ITC for the said period shall not be done on a month-to-month basis, rather will be given effect on a 'cumulative' basis as explicitly prescribed under first proviso to Rule 36(4) of the Central Goods and Services Tax Rules, 2017 (CGST Rules). The HC specifically highlighted that when the provision was explicitly prescribed for such computation on a cumulative basis for the said period, the department had erred by making computation on a pre-existing monthly basis as prescribed under the circular. Accordingly, the HC opined that the circular that conflicts with the amended statutory law cannot be enforced.

## Facts of the case

- M/s. Vivo Mobile India Private Ltd. (the petitioner) is engaged in the business of manufacture, assembly and wholesale trade of cellular phone devices, and its spare parts and accessories.
- The petitioner had purchased various components of mobile phones from different suppliers against a valid tax invoice and claimed the ITC in respect of such purchases.
- The department demanded the reversal of such ITC on the ground that the petitioner had violated Rule 36(4) of the CGST Rules and availed/utilised excess ITC amounting to INR 110.06 crores for the period February to August 2020. Accordingly, requisite interest and equal amount of penalty was also imposed, with total demand amounting to INR INR 235.52 crores.
- The petitioner challenged the demand order vide the present writ petition and had initially deposited 10% of the total tax amount as pre-deposit.
- However, owing to the absence of any stay order, the department had recovered INR 220.13 crores towards the entire tax amount, along with an equal amount of penalty.

- Subsequently, the recovery of the balance amount towards interest was stayed. The petitioner sought a refund of the entire amount recovered, along with pre-deposit with requisite interest on the same.

## Petitioner's contentions

- The petitioner stated that the department had mistakenly considered month-to-month reconciliation of the ITC available and utilised in terms of GSTR-3B and GSTR-2A, instead of considering the period from February 2020 to August 2020 cumulatively as a single tax period.
- For the purpose of ITC computation, the petitioner had considered all the tax invoices that were reflected in GSTR-2A at the time of filing GSTR-3B for September 2020. Such eligible ITC was increased by 10% permissible addition in terms of Rule 36(4) of the CGST Rules, and accordingly, such amount was taken as eligible ITC. Accordingly, the petitioner challenged the demand order, as there was no excess utilisation of the ITC.
- The petitioner contended that the department had misread the circular and interpreted the phrase 'on the due date of filing of the returns' to mean a month-

to-month reconciliation whereas the first proviso to Rule 36(4) explicitly specifies a 'cumulative period'. Additionally, it was stated that the impugned circular cannot be enforced, as it was issued prior to the introduction of Rule 36(4).

- It was also emphasised that GSTR-2A does not create the 'substantive right' of the ITC, rather it is merely a facilitator that enables the petitioner to take an informed decision for self-assessment.
- The petitioner also asserted that the ITC is a statutory right that cannot be taken away by interpreting the law in a different sense. Further, it was stressed that a circular can neither take away a statutory right or a benefit and nor impose a new condition.

#### **Allahabad HC's observations and judgement [Writ Tax No. 433/2021; Order dated 5 September 2023]**

- **ITC is a substantive right that can be availed/utilised provisionally:** The HC examined the ITC provisions and stated that it is a statutory right created by the statute, which can be claimed provisionally without any reconciliation or final payment of tax. However, such provisional ITC is liable to be reversed, along with interest if the tax so collected is not deposited by the supplier in the government treasury. The HC held that prior payment or deposit of tax is not mandatory for provisional availment/utilisation of ITC. However, the supplier is obligated to deposit the tax on a monthly basis by way of filing a monthly return.
- **Availment/utilisation of ITC does not depend on filing of returns:** The HC opined that although the statutory provisions prescribe a specific date for filing of returns by the supplier, the same cannot be associated to availment/utilisation of the ITC. The HC drew

reliance from the decision of the Calcutta HC in the case of *Suncraft Energy Private Limited* and asserted that furnishing the details of the tax invoice in GSTR-1 by the supplier is a merely a measure of facilitation.

- **Eligible ITC for February to August 2020 shall be computed cumulatively:**

The HC examined Rule 36(4) of the CGST Act and observed that it permitted additional 10% of the eligible ITC in terms of GSTR-2A to be claimed as provisional ITC. Further, in terms of the first proviso to the rule, such eligible ITC shall be computed for the period February to August 2020 on a cumulative basis. The HC affirmed that when the first proviso explicitly prescribed such cumulative computation, adopting a month-to-month computation by relying on the pre-existing circular would be violative of the first proviso. The HC explained that the stipulation of the filing of GSTR-1 by the supplier is merely a measure of facilitation and not for grant of provisional ITC.

Alternatively, it was explicated that the intention of the legislature was not merely deferment of date, rather it was precisely to allow 'cumulative adjustment' for the period February to August 2020.

- **Pre-existing circular that conflicts with the amended statutory law is invalid:**

The HC held that the first proviso superseded the pre-existing month-to-month reconciliation of the eligible ITC specifically for the period between February and August 2020. Accordingly, the impugned circular, which prescribed the monthly reconciliation, was in conflict to the amended provision and cannot be enforced for the said period. In view of the above, the HC quashed the demand order.

## Our comments

This is an important judgement that pertinently clarifies that a circular, being an administrative instruction, loses its enforceability if it runs contrary to the amended statutory law. The impugned circular prescribed that an additional ITC of 10% of eligible ITC, in accordance with Rule 36(4) of the CGST Rules, can only be availed as per the eligible ITC for the 'respective month'. However, the first proviso to Rule 36(4) of the CGST Rules specifically prescribed that such eligible ITC shall be computed cumulatively for the period February to August 2020. Therefore, owing to the conscious departure from the pre-existing position for the said period, the validity of the circular is diluted.

Additionally, it is also apposite to note that the HC deprecated the conduct of the department to recover 100% of the total disputed amount when the assessee had already deposited 10% as pre-deposit, leading to the recovery of 110% of the total amount of demand.

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