

Time Period of February, 2020 to August, 2020 to be considered cumulatively for availing GST Credit under Rule 36(4) of the CGST Rules

The Hon'ble Allahabad High Court in the case of *M/s. Vivo Mobile India Private v. Union of India and Others [Writ Tax No. 433 of 2021 dated September 5, 2023]* allowed the writ petition and held that as per Rule 36(4) of the Central Goods and Services Tax Rules, 2017 ("**the CGST Rules**"), the time period of February 2020 to August, 2020 would be considered cumulatively for calculating the amount of eligible Input Tax Credit ("**ITC**") for the invoices or debit notes, details of which has not been furnished, prescribing a limit of 10 per cent of the eligible ITC, pertaining to invoices or debit notes furnished by the supplier.

Facts:

M/s. Vivo India Private Limited ("**the Petitioner**") is engaged in the business of manufacturing, assembly and wholesale trade in cellular phone devices, spare parts and accessories and has a manufacturing facility at Greater Noida, Gautam Buddh Nagar, Uttar Pradesh.

From February, 2020 to August, 2020, the Petitioner purchased various components of mobile phone and other related items from different suppliers within the country. The demand was raised by the Revenue Department ("**the Respondent**") claiming that the Petitioner had availed/utilized excess ITC of Rs.110,06,90,100.31/- for the month of February, 2020 to August, 2020. The Respondent vide order dated April 7, 2021 ("**the Impugned Order**") confirmed the demand raised, and held that excess ITC of Rs.110,06,90,100.31/- for the month of February, 2020 to August, 2020 was availed by the Petitioner in violation of Rule 36(4) of the CGST Rules., thereby directed the Petitioner to reverse the ITC claimed and added the amount of ITC claimed, towards Output Tax liability along with interest. The Respondent also imposed a penalty, equal to the amount of excess ITC claimed by the Petitioner under Section 74 of the Central Goods and Services Tax Act, 2017 ("**the CGST Act**"). The Respondent created a Demand of a total amount of Rs.235.52 crores which is inclusive of interest of Rs.15,40,00,000/-.

Aggrieved by the Impugned Order and the demand raised by the Respondent, the Petitioner filed a writ petition before the Hon'ble Allahabad High Court for quashing the Impugned Order and pre-deposited the amount of Rs.11,00,69,010/- being ten per cent of the disputed demand of GST and disputed the entire tax liability.

However, the Respondent recovered the entire amount of Rs.220,13,80,200.69/- of the entire tax liability from the Petitioner. The Petitioner filed the writ petition on the ground that the error in the computation of the excess ITC has arisen due to relying upon *Circular No. 123/42/219-GST dated November 11, 2019 ("the Impugned Circular")*. However, certain provisions of the Impugned Circular being contrary to *Notification No. 30/2020 dated April 3, 2020 ("the Notification")*, and other related Notifications, could not be enforced for determining the amount of eligible ITC claimed.

The Petitioner also filed a Civil Miscellaneous Restitution Application No. 10 of 2022 praying for a refund of the entire amount deposited with the Respondent i.e. Rs.220,13,80,200.69/- and amount of Rs.11,00,69,010/- pre-deposited with the Respondent. The Petitioner has also claimed interest on the amount deposited with the Respondent.

Issue:

Whether the time period for the months of February, 2020 to August, 2020 would be considered cumulatively for calculating the amount of Eligible ITC for the invoices or debit notes, details of which have not been furnished by supplier in GSTR 1?

Held:

The Hon'ble Allahabad High Court in the case of ***Writ Tax No. 433 of 2021*** held as under:

- Observed that, the GST regime is founded on the premise that the GST is leviable at every link of value addition and Assessee can claim ITC on the tax paid, which is used

to offset outward tax liability. Section 16 of the CGST Act prescribes conditions for availing of Input Tax Credit wherein Section 16(1) of the CGST Act registered person is eligible to claim ITC as per the conditions enumerated in the Act. Section 16(2) enumerates the eligibility conditions for availing ITC. Section 16(2) of the CGST Act, states that in case where the recipient fails to pay the supplier the value of supply along with GST payable, within a period of 180 days from the date of issuance of the Tax Invoice, the ITC is reversed and amount is added to the recipient outward tax liability. Section 37 of the CGST Act, prescribes that every registered person is required to furnish the details of Outward Supply electronically monthly on or before the tenth day of the month.

- Further Observed that, the Respondent vide *Notification No. 49/2019 dated October 09, 2019*, inserted sub-rule (4) to Rule 36 of the CGST Rules stating that a registered person can claim ITC in respect of invoice or debit notes the details of which have not been uploaded by suppliers in GSTR-1, only to the extent of 20 per cent of the eligible credit available in respect of invoice or debit notes the details of which have been uploaded by the supplier. Further, by way of the Impugned Circular, condition was imposed that the amount of ITC calculated in cases where the details of invoice and debit notes are not furnished would be on the basis of invoices or debit notes the details of which have been uploaded by the suppliers under Section 37(1) of the CGST Act as on the due date of filing of the returns in FORM GSTR-1 of the suppliers for the said period which has to be ascertained on the basis of auto-populated FORM GSTR 2A available on the due date of filing of FORM GSTR-1 under Section 37(1) of the CGST Act. The amendment was made in Rule 36(4) of the CGST Rules vide *Notification No. 75/2019 dated December 26, 2019*, wherein the limit of ITC claimed under Rule 36(4) of the CGST Rules was reduced from 20 percent to 10 percent. Thereafter first Proviso to Rule 36(4) was inserted by way of the Notification, stating that the conditions in Section 37 of the CGST Act would apply cumulatively for the period of February, March, April, May, June, July and August of the year 2020 and the return in Form GSTR-3B for

- tax period of September, 2020 shall be furnished with cumulative adjustment of the ITC for the above said period
- Noted that, the Impugned Circular being contrary to the statutory provision and first proviso of Rule 36(4) of the CGST Rules, cannot be enforced in the present case for the limited period of February, 2020 to August, 2020.
 - Opined that, the condition laid out in Rule 36(4) of the CGST Rules, stating that, the amount of the eligible ITC for the period of February, 2020 to August, 2020, not exceeding ten per cent of the eligible ITC as per Tax invoice or Debit Note, filed by supplier in GSTR-1 has to be calculated cumulatively.
 - Further opined that, the Respondent has the power to recover the amount from the Petitioner during the pendency of the writ petition even if the Petitioner has pre-deposited the ten per cent of the disputed tax amount in the absence of an interim order issued by the Court granting protection from the recovery of the disputed tax amount, however, the Respondent actions to recover the entire disputed tax amount is unacceptable. The Respondent should have taken into consideration any amount which has been pre-deposited by the Petitioner.
 - Held that, the Impugned Order is quashed and the entire amount recovered from the Petitioner by the Respondent shall be returned to the Petitioner within a period of six weeks along with interest @ 6 percent of Rs.11,00,69,010/- i.e. excess amount recovered, from the date of excess recovery to the date of actual refund. The Court granted the liberty to the Respondent to recover up to 10 percent of the interest amount from the erring official of the Respondent. Hence, the Writ Petition is allowed.

Relevant Provisions:

Rule 36(4) of the CGST Rules

“(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under sub-section (1) of section 37 unless,-

(a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility; and

(b) the details of input tax credit in respect of such invoices or debit notes have been communicated to the registered person in FORM GSTR-2B under sub-rule (7) of rule 60.

*Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in **FORM GSTR-3B** for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.”*

Author can be reached at info@a2ztaxcorp.com)

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