

Time Limit under Section 16(4) - Easy Solution at Sight

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The time limit for availment of input tax credit in terms of Section 16(4) of the CGST Act, 2017 has affected a number of assesseees prompting litigation across the country. The Patna, Kolkata, Andhra Pradesh and Chhattisgarh High Courts have upheld the validity of the provisions and the basic premise for upholding the provision are the decisions of the Supreme Court in **Jayam & Co. (2016) 96 VST 1 (SC) and ALD Automotive.**

The Kerala High Court in the case of [Tradelinks](#) has held that from 01.07.2017 till 30.11.2022, if the return is filed after 30th September and the claim for ITC was made before 30th November, the claim of ITC should be processed. Amendment to Section 16(4) substituting 30th November as the date has to be given a retrospective effect. Matters are pending in other Courts including the Madras High Court and the appeal against the Patna High Court decision is pending before the Supreme Court.

Other Arguments / Submissions

While the Courts have looked at the issue from the point of whether it is a statutory right or whether the law maker can stipulate conditions for credit, the following arguments / submissions are yet to be tested.

- (i) ITC should be perceived as a constitutional right as against a statutory right. Elimination of Cascading Effect of Tax was the Purpose of Introduction of GST through the Constitution Amendment Act.
- (ii) The decisions in the sales tax law, with reference to statutory rights have not considered the excise law decisions with reference to Cenvat Credit where it was conceived as a right available till the event of set-off happened.
- (iii) When the design of GSTR envisaged data sharing by the supplier; mirror imaging for the buyer; verification by the buyer; acceptance or rejection by the buyer; filing of a purchase return by the buyer; mirror imaging in the hands of the supplier; amendment by the supplier; and none of these could be operationalised, implementing only one part of the GST system, or insisting on time limits under Section 16(4) would be manifestly arbitrary.
- (iv) Section 16(4) is part of the package and has no legs to stand on when the other three legs have collapsed (GSTR-2, GSTR-3, GSTR-1A).
- (v) The legal maxim "expression unius est exclusio alterius" is applicable. This means that when a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all.
- (vi) The time limit under Section 16(4) is applicable only to an invoice under Section 31 and does not apply to bill of entry for import of goods; import of services; services on which reverse charge mechanism is applicable under [Notification No. 13/2017 - CTR](#); document for ISD. This by itself violates Article 14.
- (vii) Section 16(4) cannot be operationalised upto 01.01.2021, since it contemplated the existence of two dates and choosing one from the same. Till 01.01.2021, Section 39(1) read with Rule 61 referred only

to GSTR-3 which was never operationalised and hence, Section 16(4) itself cannot be operationalised.

Practical Challenges for Assesseees

However, the purpose of this Article is not to look at the constitutional validity or elaborate on submissions that can be made before other Courts. The object of this Article is to provide for an easy solution for the Government / GST Council to solve the predicament of number of assesseees who are caught in the clutches of Section 16(4) time limits. The problems for the assesseees are that they wanted to file the return and claim the ITC but the portal refused to accept the return unless the taxes are paid. If one monthly return is defaulted, the next month return cannot be filed unless the previous month return is filed after payment of taxes, interest and late fee. Thus, a cascading default situation arose. In contrast, the pre-GST law allowed returns to be filed even if the entire tax was not paid.

The fact remains that all these assesseees have filed the returns beyond the due date for filing return for September following the financial year or 30th November and in most of the cases, the returns have been filed before the due date for filing annual return.

The fact of the matter is that the belated return that is filed is a return filed for the relevant month and the turnover pertains to the relevant month and the tax liability pertains to the relevant month warranting payment of interest. For example, if there is a default in filing a return for say April 2021 and it is filed belatedly, say in December 2022, the return that is being filed is still the return for April 2021, the tax pertains to April 2021, and the ITC claimed also pertains to April 2021. It is not as if the ITC is claimed in December 2022.

Section 50(1) recognises this and specifically provides that where a return is filed beyond the due date, interest shall be payable only on the tax paid through debiting electronic cash ledger. No interest is levied on the ITC portion, thus recognising that it was already available.

Concept of Belated Return

Section 39(1) of the CGST Act, 2017 deals with returns and Section 39(11) specifically provides that a registered person shall not be allowed to file a return for a tax period after the expiry of a period of three years of due date of furnishing the said return.

Thus, the statute recognises that a belated return would be accepted upto a period of three years from the due date. In fact, the proviso provides that the Government may even allow such returns even beyond the period of three years subject to conditions and restrictions to be notified.

Once belated return is filed, accepted with late fee, it should be treated as a return filed under law.

The Bombay High Court in the case of ***Tulsidas Bhopal Ji Charitable & Chaleshwar Temple Trust Vs. CIT*** at Para 6 has held that on a careful reading of Section 139 of the Act, we are of the clear opinion that Section 139(1) and 139(4) have been read together and on such a reading the inevitable conclusion is that a return made within the time specified under Section 139(4) has to be considered as having been made within the time prescribed in 139(1) or 139(2).

It is pertinent to note that the Bombay High Court applied the decision of the Supreme Court in the case of ***CIT Vs. Kulu Valley Transport Company Pvt. Ltd.*** wherein the Supreme Court held that when the provisions stipulated that the benefit of set-off and carry forward loss is available only when the return is filed under Section 22(1) of the Income Tax Act, 1922 (corresponding to Section 139(1) of the Income Tax Act, 1961), then the return filed under Section 22(3) (corresponding to Section 139(4)), should be considered to have been filed within the time set out in Section 22(1). The Court held that Section 22(1) must be read with Section 22(3).

Section 139(1) of the Income-tax Act, 1961 provides for filing of return of income before the due date in the prescribed form. Section 139(4) provides that any person who has not furnished a return within the time allowed to him under 139(1) may furnish the return for any previous year at any time before three months prior to the end of the relevant assessment year or completion of assessment, whichever is earlier.

Section 47 of the CGST Act, 2017 deals with levy of late fee and does not stipulate any outer limit by which a belated return could be filed. An outer limit of three years was introduced for the first time by Finance Act, 2023 with effect from 01.10.2023 through the insertion of Section 39(11).

Section 39(11) thus permits filing of return upto the period of three years from the due date of furnishing the return and after that it requires a special notification subject to conditions.

Section 39(1) and 39(11) of the CGST Act, 2017 have to be read together and once a belated return is filed within a period of three years from the due date, it should be considered as a return filed under Section 39(1) as per the law laid down by the Supreme Court which interpreted similar provisions in the Income-tax Act, 1961.

The law recognizes a belated return and once a belated return is filed, it is as good as the original return since Section 39(1) deals with the return and the law as well as the system accepts the belated return for that month. Section 39(11) reaffirms this position.

What should the GST Council / Government do?

The GST Council / Government can solve the problems of many assesseees who have paid the taxes belatedly with interest and are suffering the impact of Section 16(4) by doing either of the following:

(i) Issue a Circular to state that once a belated return is filed within time limit under Section 39(11), then there is no violation of Section 16(4). Corresponding directions should be given to the field formations to pass rectification orders and give appropriate relief wherever orders have been passed denying the benefit of ITC based on section 16(4).

(ii) Issue a Removal of Difficulty Order to declare that if a return is filed belatedly within the period of three years from the due date for furnishing the return, there would be no violation of the time limits set out in Section 16(4).