Availability of ITC in respect of duty/tax paid after July 2017 for past transactions under CEA, 1944/FA, 1994/CA, 1962

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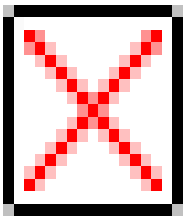

1. **THE** generally prevalent view doing the rounds is that ITC of CVD/differential duty/tax paid after 1.7.2017 in respect of transactions pertaining to the period prior to 1.7.2017 is not available and the provisions of s. 142 (7)(a), (8)(a) and (9)(a) of the CGST **Act, 2017** (hereinafter refereed to as the said sub-sections) are cited in support of this view. Indeed, writs have been filed in the various High Courts questioning the Constitutional validity of some of the said sub-sections on the ground that they deny a vested right and violate the provisions of s. 174(2) of the CGST Act, 2017 which ***inter alia*** guarantees that the right, privilege, acquired or accrued under the amended Act or repealed Acts or orders under such repealed or amended Act would not be affected. The said subsections are reproduced below for ready reference -

> ***S.142***
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> ***(7)(a) every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of duty or tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;***
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> ***(8)(a) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;***
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> ***(9)(a) where any return, furnished under the existing law, is revised after the appointed day and if, pursuant to such revision, any amount is found to be recoverable or any amount of CENVAT credit is found to be inadmissible, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;***

2. The purpose of this article is show the fallacy of this commonly held view which is a result of inaccurate / inattentive reading of the said subsections.

Payment Vs. recovery

3. For the correct appreciation and interpretation of the said sub-sections, it is unavoidable to understand the fundamental difference between payment and recovery as enshrined in the relevant laws.

The Central Excise Law, Service Tax law and GST law have specific provisions for determination of the duty/tax payable and for making the recovery thereof. Section 11A of the Central Excise Act, 1944, section 28 of the Customs Act, 1962 and Section 73 of the Finance Act, 1994

as well as of CGST Act, 2017 contain provisions for issuance of show cause notice as to why the assessee should not pay duty/tax not levied/short levied/ erroneously refunded and for adjudication thereof to determine the amount due. Thus, these sections are only for determining the duty/tax due/ payable and not for making recoveries (notwithstanding their titles/headings which have little interpretative value in view of the unambiguous language of these sections. Same is true of the provisions relating to provisional assessment in these Acts). All these sections are similarly worded and, therefore, for the sake of brevity, it will suffice to specifically refer to any one of these sections to inexorably drive home this point and for that purpose, S.73 of the Finance Act, 1994 is reproduced below:

> ***Section 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.-***
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> ***(1) Where any service tax has not been levied or paid or has been short-levied or short- paid or erroneously refunded, the Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:***
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> ***(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1).***
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> ***(2) The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.***

As is evident, while sub-section (1) of s.73 enables issuance of show cause notice requiring an assessee to show cause why he should not pay the amount specified in the notice, sub-section (2) thereof authorizes the adjudicating authority to determine the amount due or payable which the assessee is required to pay. Thus s.73 is not a recovery provision. Indeed sub-section (1B) leaves no doubt that only in case of non-payment, recovery is to be effected in terms of the provisions of section 87 of the Finance Act, 1994. Similarly, the Central Excise Act has its own recovery provision (section 11) as does Customs Act (s. 142). Like other recovery provisions, section 142 of the Customs Act makes it clear that it is to be invoked when any sum payable is not paid.

4. CGST Act also contains specific section for effecting recoveries (section 79) as different from section 73 which is for issuance of show cause notice and determination of the amount payable. Indeed, section 78 of the CGST Act makes it amply clear that recovery action under section 79 is to be resorted to only when the amount payable is not paid within 3 months. Section 78 is reproduced below:

> ***S. 78. Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated:***
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> ***** *****

5. It is thus evident that if the amount due as determined as a result of adjudication/appeal, finalisation of assessment or revision of return is paid, the need or occasion to invoke the recovery provisions would not arise and so the amount so paid will not be qualified to be called the amount recovered under CGST Act. Thus, indisputably, recovery is different from payment and the former comes into action only when the payment is not made. It is, therefore, beyond doubt that these two words (recovery and payment) are not only different in lexicon but are treated as distinct in the law itself.

6. It is clear that the said sub-sections deny ITC only of that amount which was recovered as arrears under the provisions of CGST Act viz. s. 79 thereof. The express denial of ITC only and only of that amount which was so recovered by necessary implication implies that ITC of the amount which was paid (and thereby leaving no occasion to effect its recovery as arrears by resorting to the recovery provisions) is permitted.

7. At this juncture, a word about the doctrine of 'necessary implication' is in order. A survey of a large number of judgements shows that the word 'expressly' is always used in conjunction with the expression 'or by necessary implication'. Thus a statute can permit a thing expressly or by necessary implication and both these types of permissions are equally efficacious. In other words, a thing permitted 'expressly' cannot be

said to be 'better permitted' than that thing permitted by 'necessary implication'.

Now, an example to silence the skeptics. If on a traffic signal, a signboard reads 'left turn not allowed on red light on Tuesday, Thursday and Saturday', then inarguably by the doctrine of necessary implication, left turn is allowed on red light at that traffic signal on the remaining days of the week. Exactly similarly, 'ITC shall not be available of the amount so recovered' by necessary implication clearly implies that ITC is available if the amount was paid, thereby leaving no scope for the department for making recovery of the same as arrears by invoking the recovery provisions in CGST Act and hence that amount cannot be said to have been 'so recovered'.

Harmony with s. 174 of the CGST Act

8. The above interpretation, fully self-sustaining as it is, also harmonizes with s. 174 (2) which ***inter alia*** states as under:

> ***S.174 (2) The repeal of the said Acts and the amendment of the Finance Act, 1994 (hereafter referred to as "such amendment" or "amended Act", as the case may be) to the extent mentioned in the sub-section (1) or section 173 shall not-***
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> ***** ****
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> ***(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Act or repealed Acts or orders under such repealed or amended Acts:***

Thus s.174(2), which, ***inter alia,***
guarantees that the right, privileges, acquired, accrued under the amended Act or repealed Acts or orders under such repealed or amended Act shall not be affected, would be mighty offended if the ITC of such amounts paid were to be denied by the said sub-sections because the credit of such amounts would have been clearly admissible under the existing laws and the assessee cannot be faulted that the adjudication/finalisation of assessment pertaining to the pre-GST period took place after 1.7.2017. The doctrine of protection of vested right is not really required to be invoked as the statutory provisions of the CGST Act (the said sub-sections read with or without s. 174) themselves take care and allow ITC of the amounts paid.

9. It is pertinent to mention that section 142 (including the said sub-sections) of the CGST Act is a self-contained section and is not subject to the provisions of section 16 ibid. Also section 16 does not contain ***non obstante***
clause. Therefore, once section 142 allows ITC (which is also supported by section 174(2) ibid), section 16 (or any other section for that matter) cannot be allowed to have a chilling effect thereon.

10. It thus stands proved that the initially mentioned commonly held view is a result of an inaccurate or inattentive reading of the said sub-sections and that the ITC of the amounts referred to therein is admissible provided the same were paid (as different from recovered as arrear of tax under CGST Act).

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