

## **ELIGIBILITY OF ITC ON COVID-19 EXPENSES AND CSR ACTIVITIES**

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COVID pandemic has led to a dramatic loss of human life worldwide. The pandemic has not just affected physical and mental health, but has also adversely impacted the businesses. During this time, lot of organizations have contributed to various social causes, some as part of mandatory CSR contribution, some beyond mandatory 2% CSR and some businesses just to give back to the society for all resources made available to it.

While mere contribution in the form of funds is not under the purview of GST law, the expenses incurred towards purchasing goods and contributing them to society and other expenses incurred to maintain the COVID protocols at work places have suffered GST. The question that arises is whether GST paid on such expenses is eligible as Input Tax Credit (ITC) to the businesses.

All of us are aware that the GST return for the month of September is crucial given the deadline prescribed for various compliances such as issuance of tax credit notes, amendments in GST returns, etc. One of the major compliances to be undertaken by September of any financial year would be to avail input tax credit pertaining to previous year, ie, the cut off for availing the input tax

credit pertaining to FY 2020-21 would be 20.10.2021 being the due date for filing September 2021 GSTR 3B.

With respect to COVID-19 related expenses, some of the businesses are circumspect about availing ITC. Therefore, the authors are writing this article to apprise the businesses about the eligibility of ITC on expenses related to COVID-19, given that the deadline for availing such credits pertaining to FY 2020-21 would be October 20, 2021.

### **Renting of motor vehicle, medical insurance**

Section 17(5)(b) of CGST Act restricts the ITC wrt renting or hiring of motor vehicle, medical insurance amongst others. However, ITC on such services shall be allowed where it is mandatory for an employer to provide the same to its employees under any law for time being in force.

As per Annexure II of MHA order dated 15.04.2020 issued under the Disaster Management Act, 2005 (DMA), all work places should:

- a. Provide transportation facility to workers. The term 'workers' has not been defined under DMA. It appears that workers could also be read as employees considering the spirit in which the order was issued.
- b. Medical insurance
- c. Thermal scanning and other sanitisation materials

Given that transportation facility and Medical insurance are made mandatory under DMA *vide* MHA order, businesses could avail the input tax credit on such expenses even though the ITC is not allowed under normal circumstances.

Having said that, Medical insurance has been omitted from MHA order dated 01.05.2020 and the said guidelines fails to save the earlier order dated 15.04.2020 and hence a question arises whether the ITC on medical insurance obtained only during the period 15.04.2020 to 01.05.2020 are eligible to be availed? In view of paper writers, ITC on such medical insurance should be eligible as there was the MHA order making medical insurance

mandatory, as such services could be covered at the limb “obligatory for employer under the law”.

### **Other COVID-19 expenses**

Every registered person shall be eligible to avail ITC on goods or services, used or intended to be used on the course or furtherance of business subject to certain conditions prescribed in section 16 such as possession of invoice, receipt of goods/services, availed within time-limit, etc.

The language of section 16 uses the words in the **course** or furtherance of business. Therefore, even if input services are received by registered person for any business purposes and does not have direct one-to-one correlation with outward supplies, the registered person is eligible for input tax, such as audit expenses, legal charges, security expenses, other administrative expenses, etc where there is no correlation with outward supplies. The ITC on such expenses could be availed by taxpayer unless ITC on such expenses are specifically excluded under section 17(5) of CGST Act.

Expenses incurred wrt COVID-19, such as thermal scanning, sanitizers, PPE kits and other allied expenses incurred are very much essential for functioning of offices post COVID era. Given the same, the authors believe that expenses incurred are in the course of business and hence ITC should be allowed on such expenses, as there is no specific restriction under section 17(5) of CGST Act.

### **Oxygen concentrators/cylinders**

Many businesses have incurred expenses towards purchasing oxygen concentrates and have provided to employees whenever required. While, employees are the most important asset of the business, the GST law restricts ITC on goods or services used for personal consumption. The question that arises is whether provision of oxygen concentrates to employees could be classified as personal consumption, considering that business would be severely affected without employees? While author believes ITC should be allowed on such expenses, however the department may dispute on technical interpretation that GST law restricts ITC under section 17(5)(g) of CGST Act.

## **CSR expenses**

Section 17(5)(h) of CGST Act restricts ITC on goods disposed of by way of gift. Gift is not defined under CGST Act and as per common parlance gift is made without any consideration, is voluntary in nature and is made occasionally. As per Companies Act, 2013, businesses are mandatorily required to spend atleast 2% of net profits of the Company towards CSR activities.

Given that CSR expenditure is mandatorily required under the law, the authors believe that the expenditure incurred cannot be termed as gift as such expenses are not voluntary in nature. Consequently, the ITC on goods contributed towards CSR activities cannot be restricted under 17(5)(h) of CGST Act and should be eligible in the hands of taxpayers.

As ITC is available to the taxpayer, they will be required to incur additional CSR expenditure to the extent of eligible ITC.

In this context, it is important to note that in the cases such as of Essel Propack Ltd vs Commissioner of CGST, Bhiwandi (2018 (362) E.L.T. 833 (Tri. – Mumbai), while allowing CENVAT on CSR expenses, observed that CSR is not charity as same is having direct bearing on manufacturing activity of company that is largely dependent on smooth supply of raw materials. CSR also augments credit rating of company as well as its standing in corporate world. Hence, sustainability of company is dependent on CSR without which companies cannot operate smoothly for long period as they are dependent on various stakeholders to conduct business in economically, socially and environmentally sustainable manner i.e. transparent and ethical

Further, the above aspects have been rightly interpreted by the UP AAR in the case of M/S. Dwarikesh Sugar Industries Limited (TS-1238-AAR(UP)-2020-GST) and allowed the ITC on CSR expenditure, the Kerala AAR in the case of Polycab wires Pvt Ltd (KER/30/2019, dated 2-3-2019) held that ITC is not allowed on goods given as free items under CSR. It is worth noting that the AARs are applicable only to the specific applicant. Moreover, authors believe that the AAR in the case of Polycab Wires has not analysed the provisions of ITC in true spirit and the purpose for which CSR expenditure is incurred by

businesses. Similarly, the Gujarat AAR in the case of M/s Adama India Private Limited, has merely added one more ruling to the long list of pro-revenue rulings, without appreciating the provisions of Companies Act and GST law in it's right spirit.

In addition to the above, the authors believe that the expenses incurred over and above 2% towards CSR could be termed as voluntary in nature and therefore ITC on same could be disputed as restricted under section 17(5)(h) of CGST Act.

### **Conclusion**

Given that the deadline for availing the ITC pertaining to FY 2020-21 is fast approaching, the Government needs to take the above aspects into consideration and come out with a Circular clarifying the eligibility of ITC on various expenses incurred by businesses towards COVID expenses and other CSR activities. The business of taxpayers are severely affected due to pandemic, the disallowance of ITC on these expenses should not add additional tax burden to the taxpayers.

While this article is a guidance for filing of September 2021 return, the principles of the above article should be applicable equally for subsequent period as well.

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