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Input Tax Credit under Section 16 (2) – The Etymology of Double/Triple Jeopardy (???)

Informally, it is called the “Double Whammy” or the “Triple Whammy” – I write this article to put forth an instance of Double/Triple Jeopardy in connection with Input Tax Credit under Section 16(2).

The term ‘jeopardy’ is defined as a “hazard, danger or peril.” With respect to criminal jeopardy it connotes “the risk of conviction and punishment” The expression is defined in Black’s Law Dictionary as “a second prosecution after the first trial for the same offence”.

Origin of Double Jeopardy

The principle derives its origin from the English common law principle of ‘*nemo debet vexari*’ meaning a man may not be put twice in peril for the same offence. The principle has also been accepted as a part of the 5th Amendment right under the united states Constitution. The doctrine appears to have originated in

Roman law, in the principle non-bis in idem ("not twice against the same [thing]").

Double Jeopardy under Constitution of India

A Fundamental Right which is guaranteed under Article 20(2) of the **Constitution of India** incorporates the principles of "autrefois convict" or **Double jeopardy** which means that a person must not be punished twice for the offence. ... And if a person is punished twice for the same offence it is termed **Double jeopardy**. The doctrine appears to have originated in Roman law, in the principle non-bis in idem ("not twice against the same [thing]").

Article 20 (2) states that no person shall be prosecuted and punished for the same offence more than once. This provision is couched in part of Part III of the Constitution which means that it is a fundamental right and it is the duty of the State to ensure that no action is taken that violates this right. This right was incorporated from the inspiration gained from the English common law principle of *nemo debet vexari* and **5th Amendment** of the U.S. Constitution.

However, the right under the Indian Constitution is narrower than that bestowed by the other English or the U.S. laws. Under the English and American laws, a person cannot be tried for an offence and convicted if he has earlier been tried of the same offence.

Under **Article 20(2)**, the person should not only be tried but also convicted of the offence in the previous occasion to claim the right

in any subsequent trial for the same offence.

Double Jeopardy under GST Law

Double jeopardy, *non-bis in idem*, or *ne bis in idem* is a procedural defence that prevents an accused person from being tried again on the same (or similar) charges following a valid acquittal or conviction in the same jurisdiction. But when we examine the provisions of Section 16 of CGST Act, 2017, the results are contradictory and not aligned to the principles laid down under Article 20 (2) of the Constitution of India.

Before we dive into the depths of Ocean Weaves, I am reproducing the provisions of Section 16, Section 49, Section 41, Section 43A and Section 39 of CGST Act 2017 which are reproduced below:

SECTION 16. Eligibility and conditions for taking input tax credit. —

(1) **Every registered person** shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) **Notwithstanding anything contained in this section**, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless:

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed; ***(controllable in the hands of RTP)***

(b) he has received the goods or services or both. ***(controllable in the hands of RTP)***

[Explanation. — For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services —

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.]

(c) subject to the provisions of [section 41 or section 43A], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply; and (uncontrollable in the hands of RTP because after pay outs made to supplier it is very difficult to control the supplier to deposit the tax dues and file their GST Returns though off late many Business Enterprises have adopted the policy of non-disbursing of GST Component on Tax Invoices till the same is appropriately reflected on the GSTN portal by appropriate compliances by the supplier but such policy is not in the interest of trade which makes such situation controllable in the hands of RTP).

(d) he has furnished the return under section 39: (controllable in the hands of RTP)

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed :

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or [* * *] debit note pertains or furnishing of the relevant annual return, whichever is earlier :

[Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of

any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.]

SECTION 49. Payment of tax, interest, penalty and other amounts. —

(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

(2) **The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with [section 41 or section 43A],** to be maintained in such manner as may be prescribed.

(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(4) **The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.**

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of —

(a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;

(b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;

(c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax:

[Provided that the input tax credit on account of State tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;]

(d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax :

[Provided that the input tax credit on account of Union territory tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;]

(e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54.

(7) All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

(8) Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely :-

(a) self-assessed tax, and other dues related to returns of previous tax periods;

(b) self-assessed tax, and other dues related to the return of the current tax period;

(c) any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.

(9) Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both.

[(10) A registered person may, on the common portal, transfer any amount of tax, interest, penalty, fee or any other amount available in the electronic cash ledger under this Act, to the electronic cash ledger for integrated tax, central tax, State tax, Union territory tax or cess, in such form and manner and subject to such conditions and restrictions as may be prescribed and such transfer shall be deemed to be a refund from the electronic cash ledger under this Act.

(11) Where any amount has been transferred to the electronic cash ledger under this Act, the same shall be deemed to be deposited in the said ledger as provided in sub-section (1).]

Explanation. — For the purposes of this section, —

(a) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;

(b) the expression, —

(i) “tax dues” means the tax payable under this Act and does not include interest, fee and penalty; and

(ii) “other dues” means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder.

SECTION 41. Claim of input tax credit and provisional acceptance thereof. —

(1) *Every registered person shall subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.*

(2) The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section.

[SECTION 43A. Procedure for furnishing return and availing input tax credit. —

(1) *Notwithstanding anything contained in sub-section (2) of section 16, section 37 or section 38, every registered person shall in the returns furnished under sub-section (1) of section 39 verify, validate, modify or delete the details of supplies furnished by the suppliers.*

(2) *Notwithstanding anything contained in section 41, section 42 or section 43, the procedure for availing of input tax credit by the recipient and verification thereof shall be such as may be prescribed.*

(3) The procedure for furnishing the details of outward supplies by the supplier on the common portal, for the purposes of availing input tax credit by the recipient shall be such as may be prescribed.

(4) The procedure for availing input tax credit in respect of outward supplies not furnished under sub-section (3) shall be such as may be prescribed and such procedure may include the maximum amount of the input tax credit which can be so availed, not exceeding twenty per cent. of the input tax credit available, on the basis of details furnished by the suppliers under the said sub-section.

(5) The amount of tax specified in the outward supplies for which the details have been furnished by the supplier under sub-section (3) shall be deemed to be the tax payable by him under the provisions of the Act.

(6) The supplier and the recipient of a supply shall be jointly and severally liable to pay tax or to pay the input tax credit availed, as the case may be, in relation to outward supplies for which the details have been furnished under sub-section (3) or sub-section (4) but return thereof has not been furnished.

(7) For the purposes of sub-section (6), the recovery shall be made in such manner as may be prescribed and such procedure may provide for non-recovery of an amount of tax or input tax credit wrongly availed not exceeding one thousand rupees.

(8) The procedure, safeguards and threshold of the tax amount in relation to outward supplies, the details of which can be furnished under sub-section (3) by a registered person, —

(i) within six months of taking registration;

(ii) who has defaulted in payment of tax and where such default has continued for more than two months from the due date of payment of such defaulted amount,

shall be such as may be prescribed.]

SECTION 39. Furnishing of returns. —

(1) **Every registered person**, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed :

Provided that the Government may, on the recommendations of the Council, notify certain class of registered persons who shall furnish a return for every quarter or part thereof, subject to such conditions and restrictions as may be specified therein.

(2) A registered person paying tax under the provisions of section 10, shall, for each financial year or part thereof, furnish a return, electronically, of turnover in the State or Union territory, inward supplies of goods or services or both, tax payable, tax paid and such other particulars in such form and manner, and within such time, as may be prescribed.]

(3) Every registered person required to deduct tax at source under the provisions of section 51 shall furnish, in such form and manner as may be prescribed, a return, electronically, for the month in which such deductions have been made within ten days after the end of such month.

(4) Every taxable person registered as an Input Service Distributor shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within thirteen days after the end of such month.

(5) Every registered non-resident taxable person shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within twenty days after the end of a calendar month or within seven days after the last day of the period of registration specified under sub-section (1) of section 27, whichever is earlier.

(6) The Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the returns under this section for such class of registered persons as may be specified therein:

Provided that any extension of time limit notified by the Commissioner of State tax or Union territory tax shall be deemed to be notified by the Commissioner.

[(7) Every registered person who is required to furnish a return under sub-section (1), other than the person referred to in the proviso thereto, or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return :

Provided that every registered person furnishing return under the proviso to sub-section (1) shall pay to the Government, the tax due taking into account inward and outward supplies of goods or services or both, input tax credit availed, tax payable and such other particulars during a month, in such form and manner, and within such time, as may be prescribed:

Provided further that every registered person furnishing return under sub-section (2) shall pay to the Government the tax due taking into account turnover in the State or Union territory,

inward supplies of goods or services or both, tax payable, and such other particulars during a quarter, in such form and manner, and within such time, as may be prescribed.]

(8) Every registered person who is required to furnish a return under sub-section (1) or sub-section (2) shall furnish a return for every tax period whether or not any supplies of goods or services or both have been made during such tax period.

(9) Subject to the provisions of sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify such omission or incorrect particulars [in such form and manner as may be prescribed], subject to payment of interest under this Act :

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following [the end of the financial year to which such details pertain], or the actual date of furnishing of relevant annual return, whichever is earlier.

(10) A registered person shall not be allowed to furnish a return for a tax period if the return for any of the previous tax periods has not been furnished by him.

I present my instant case-scenario of Double or Triple Jeopardy in the light of the following GST Regulations:

Provisions of Section 16 (**Eligibility and conditions for taking input tax credit**), Section 49 (**Payment of tax, interest, penalty and other amounts**), Section 41 (**Claim of input tax credit and provisional acceptance thereof**), Section 43A (**Procedure for furnishing return and availing input tax credit.**) and Section 39 (**Furnishing of returns**). The following illustrated example explicitly brings out a case of Double and possibly Triple Jeopardy when the aforesaid provisions of the law are simultaneously correlated:

1. “A”, Registered Taxable Person, is a buyer located in Maharashtra;
2. “B”, Registered Taxable Person, is a buyer located in Maharashtra or any other state other than Maharashtra;

3. "A" & "B" both are carrying on business since several years and they have long business relationship;
4. "A" procures goods or services or both from "B" say amounting to Rs.10 Lakhs and applicable GST Rate viz. 12%. Thus, total transaction value is Rs.10,00,000/- plus GST Rs.1,20,000/- equals to Rs.11,20,000/-; "B" will charge either CGST plus SGST or IGST depending on its state of registration;
5. "A" has received valid tax invoice and is in possession of Tax Invoice [Section 16 (2) (a)] as well as received goods or services or both [Section 16(2) (b)], thus first two conditions are satisfied for eligible claim of input tax credit by "A";
6. "A" pay to "B" towards supplies amounting to Rs.11,20,000/- and claim Input Tax Credit of Rs.1,20,000/- in his GSTR 3B which is considered as provisionally eligible u/s 49, 41 as well as u/s 43A of the CGST Act, 2017; 16(2)(c)]
7. "A" file his return u/s 39 of the CGST Act 2017. [Section 16(2)(d)]
8. "B" due to some bad and genuine business exigencies is unable to deposit tax dues by filing his GSTR 3B (Return of Tax payment) but he has filed his GSTR 1 (Return of Outward Supplies) which means that "B" has not paid taxes due to the Govt as per the provisions of GST Act, 2017;
9. As GST has not been paid by "B", "A" has not satisfied the stipulations and conditions prescribed u/s 16(2) (c) of the CGST Act,2017, thus, "A" needs to reverse such ITC claimed along with Interest payable u/s 50 of CGST Act 2017 to the Govt by filing his returns in GSTR 3B or through DRC 03;

10. Thus, “A” pays GST on supplies procured twice viz. once to “B” and second time on its reversal to Govt through its regular return or DRC 03 as the case may be;
11. Such double pay outs by “A” can be termed as a typical instance of “double jeopardy” - for which he has no respite/redress available under the provisions of GST Act, 2017. The aforestated transactions in absolute terms are normal business transactions and it can be perceived that it would tantamount to punishing the genuine businessman twice for no fault of his, when he is actually doing business above board and in a transparent manner;
12. However, the Proper Officer (viz. Govt.) under GST law is empowered to initiate recovery proceedings in the hands of B, recover tax, interest and penalties as provided under the provisions of GST Act, 2017.

Thus, considering above illustration , I can conclude that “A” as procurer/buyer of supplies of goods or services or both, gets punished twice for no fault of his, which can be termed as falling within the ambit of the Doctrine of Double Jeopardy with no respite provided to him under the GST law. A would stand to lose in that he cannot claim such input tax credit even after paying taxes twice as well as interest as applicable under the provisions of GST Act 2017.

At the same time, Govt. can recover such tax dues along with interest and penalties from the supplier – in which case, the total tax would be collected from him as well as his buyer. Can such an interpretation and possible application of the law be termed as

Triple Jeopardy from a business perspective (tax paid twice by the Buyer and once by seller)?

This would suggest that the Govt. has its feet in milk as well as in curd – I can recall the native adage “Chat Bhi Meri and Pat Bhi Meri.” Is this irrational, unfair but factually possible scenario of “Triple Jeopardy” inadvertent or does it reflect the mindset of a Govt who would like to garner tax revenues under any circumstances?

To conclude, I would like to state that the issue needs to be immediately addressed and corrective measures initiated. From the perspective of ease of doing business in India, in such a situation Govt. should provide relief to the buyer by allowing claim of such GST paid in his GST Returns by suitably amending the provisions of section 16 of the CGST Act 2017. Consequential relief also should be provided to the seller by way of protection from recovery proceedings as Tax dues are already realised by the Govt. Also, the law can be amended whereby the buyer can claim input tax credit under Reverse Charge mechanism by raising a self-invoice so issues arising due to claim of input tax credit are minimised, and the damaging effects of double or triple jeopardy is effectively mitigated.

If above proposition is accepted, then it may be looked upon as a win-win situation from every stakeholder’s point of view viz. Buyer, Seller as well as the Government. This will resonate well with the Government’s Policies for fostering a conducive business environment with synergy, to make each business enterprise “atma nirbhar” by laying foundations and creating business conditions which will lead to the ease of doing business in India.

(Note: Views expressed are my personal views and they may not be accepted by the Govt. All readers are requested to take their considered views based on their own study to reach any suitable conclusions. While evaluating the provisions of Section 16(2) of the CGST Act, 2017, I have categorically not delved into implications of Section 73, Section 74, Section 122 & Section 132 categorically or other sections as such discussions are oceans of topics by themselves. Comments for improvements of the article are most welcome.)