

**ITC is available only if the supplier has deposited it with the Government**

**1. Mahalaxmi Cotton Ginning Pressing and Oil Industries v. The State of Maharashtra (2012) 51 VST 1 (Bom.)**

**ST : Provision of section 48(5) of Maharashtra Value Added Tax Act, 2002 is constitutionally valid**

In this case, Mumbai High Court held that, no Input Tax Credit claim shall be allowed unless the corresponding tax is paid by the selling dealer into the Government treasury. As per this verdict, the poor buyer had to suffer because of the faults of the supplier.

**2. India Limited and Ors. vs. Commissioner of Trade and Taxes, Delhi and Ors. (26.10.2017 – DELHI HC) : MANU/DE/3361/2017**

In this case, Delhi High Court took a different view altogether. While interpreting ITC provisions of Delhi VAT Act (which are in line with Maharashtra VAT, denying credit in the hands of the purchasing dealer if the selling dealer does not deposit tax with the government) Delhi High Court held that “...there was need to restrict the denial of ITC only to the selling dealers who had failed to deposit the tax collected by them and not punish bona fide purchasing dealers. The latter cannot be expected to do the impossible. It is trite that a law that is not capable of honest compliance will fail in achieving its objective. If it seeks to visit disobedience with disproportionate consequences to a bona fide purchasing dealer, it will become vulnerable to invalidation on the touchstone of Article 14 of the Constitution.’ Moreover, Departmental special leave petition no. 36750/2017 against the above order was also dismissed by the honourable Supreme Court upholding the order of Delhi High Court.

In the light of the above order of the Apex Court , there appears to be a serious challenge against the validity of condition imposed by Section 16 (2) ibid. One can infer that provisions of Delhi VAT were not substantially different from those of CGST Act and therefore, the ratio laid down by Delhi High Court as well as Supreme court is equally applicable to the GST provisions. And, therefore, the

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bona fide recipient who has purchased goods/services on a valid invoice and who has genuinely made payment to the supplier along with due taxes, must be able to claim credit even if the supplier defaults in his duties and does not deposit tax (collected from the recipient) in the Government treasury.

But Section 16(2) of the Central Goods and Services Tax Act, 2017 (CGST Act) clearly provides that the credit will not be available to recipient unless the tax is paid by supplier of goods. For the sake of convenience of our readers, the impugned provision is reproduced below : “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<sup>75</sup>;

(b) he has received the goods or services or both.

76 [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 77[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 utilisation of input tax credit admissible in respect of the said supply; and**

(d) he has furnished the return under section 39:

Therefore, it appears that unless the supplier has paid taxes (collected from the recipient) to the Government, recipient will not be eligible to claim set off in

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respect of the same. Now, the department will rely on this provision but the assessee will be relying on Delhi High Court decision affirmed by Apex Court. The litigation is bound to happen and outcome will decide the future of GST regime.