

1. What is Rule 36(4)

Rule 36(4) restricts the credit relating to the invoices not uploaded by the suppliers in their form GSTR-1 to the extent of 20% which was amended to 5% vide Notification No. 94/2020-Central Tax dated December 22, 2020 (Applicable from January 1, 2021)

2. Court Petitions

Multiple Writ Petitions like the recent one in Hon'ble Gujarat in the case M/s Surat Mercantile Association v. Union of India [R/Special Civil Application No. 13289 of 2020] has been filed which challenges Rule 36(4) of the CGST Rules on the ground of it being arbitrary, irrational and therefore, violative of Article 14 of the Constitution of India.

Similar petitions like

Gr Infra projects Limited v. Union of India [D.B. Civil Writ Petition No. 6337/2020 dated August 05, 2020], M/s. LGW Industries Limited & anr. v. Union of India & ors. [W.P.A. 92 of 2020, dated December 14, 2020]

and

M/s Society for Tax Analysis and Research v. Union of India [R/Special Civil Application No. 19529 of 2019, dated, November 14, 2019]

have also been filed wherein the respective Courts have issued notices to the Government with respect to the said rule placing restriction on the Recipient to avail ITC.

3. External Factors Beyond Control

One must observe that the conditions imposed through this rule are not under the control of the recipient and can be said to be a condition which is impossible to be fulfilled by the recipient and thereby not requiring compliance. There is a compelling argument that a bonafide taxpayer cannot be penalized by disallowing his eligible credits on account of non-compliance by the supplier.

4. Finance Act 2021

Based on the issue of validity of Rule 36(4), an amendment has been proposed vide Clause No. 100 of the Finance Bill, 2021 to insert the new clause '(aa)', after clause (a), in Section 16(2) of the CGST Act, that provides an additional requirement to claim ITC based on GSTR-2A and newly introduced GSTR-2B, i.e., ITC on invoice or debit note can be availed only when details of such invoice/debit note have been furnished by the supplier in the statement of outward supplies (GSTR-1) and such details have been communicated to the recipient of such invoice or debit note.

5. Effect of the amendment

The above proposed amendment is a step to avoid the litigations, which challenge the validity of Rule 36(4) of the CGST Rules