

# GST NEWSLETTER

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**GST Newsletter:  
Compiled and Edited by**

INCORP INDIRECT TAX DIVISION

CA PRASANNA K S | ADV. T. R. RAJESH  
ADV PRATEEK J | PRAKRUTHI C



## ARTICLE

# Can Input Tax Credit Not Appearing In GSTR 2A & GSTR 2B Be Claimed And Court's View

Under GST, Input Tax Credit or ITC is the tax paid by businesses on their purchases and expenses that they are allowed to offset against their output tax payable on their sales and services. Allowing this credit to businesses ensures there's no cascading effect and thus, businesses do not include such taxes in the price of their products or services. However, availing and utilizing the ITC is subject to various restrictions and conditions which, if not followed or fulfilled, any claim of such ITC will result in notices and levy of interest and even penalty.

Restrictions on ITC is not new to the Indirect Tax field and have been in place since VAT and Service Tax era. In GST, the restrictions against claiming ITC are manifold, but the most important restriction that affect businesses is the availability of ITC in their respective GSTR 2A or GSTR 2B. Restrictions are needed to ensure proper compliance and reduce revenue loss to the Government. However, these restrictions have only resulted in additional compliance burden and losses to honest taxpayers.

### ✔ ITC Claim-Ability

At the time of GST introduction, it was proposed that taxpayers would be provided the details of their inward supplies in Form GSTR 2A and if the taxpayer found the same to be as per the own records, then they were required to file GSTR 2 accepting or rejecting the inward transactions in GSTR 2A.





The accepted ITC as per Form GSTR 2 along with the sales in Form GSTR 1 would be auto populated in Form GSTR 3 to show the net tax payable. However, due to various reasons, the Forms GSTR 2 and 3 were never made available to the taxpayers and in their place, Form GSTR 3B was introduced.

Taxpayers were allowed to claim ITC in Form GSTR 3B on a self-assessment basis, provisionally as per Section 41(1) of the CGST Act, 2017, without any reconciliation required to be made with Form GSTR 2A. The ITC claimed provisionally is eligible only if the conditions laid down in Section 16 are fulfilled and is not ineligible in terms of Section 17(5) of the CGST Act, 2017.

As per Section 16 of the CGST Act, 2017, a taxpayer was eligible to claim ITC if they fulfilled the following conditions:

- They possessed a Tax Invoice or Debit Note issued by a registered supplier
- They have received the goods and services
- The tax charged for such inputs have been paid by their suppliers to the government either through cash or utilizing their ITC
- They have filed their GSTR 3B returnclaim

However, from 09th October 2019 the department required taxpayers to claim ITC based in their availability in GSTR 2A and subsequently in GSTR 2B.

### ✔ Summary Of ITC Claim-Ability

Period	Provision / Notification	Claim-Ability Of ITC
01/07/2017 -08/10/2019	Section 16(2) of CGST Act, 2017	All eligible ITC accounted in books of accounts
09/10/2019–31/12/2019	Notification No. 49/2019-CT	All eligible ITC accounted and reconciled in GSTR 2A plus 20% of the above ITC up to maximum of ITC as per books
01/01/2020–09/11/2020	Notification No. 75/2019-CT	All eligible ITC accounted and reconciled in GSTR 2A plus 10% of the above ITC up to maximum of ITC as per books



10/11/2020–31/12/2020	Notification No. 82/2020-CT	All eligible ITC accounted and reconciled in GSTR 2A or GSTR 2B plus 10% of the above ITC up to maximum of ITC as per books
01/01/2021–till date	Notification No. 94/2020-CT	All eligible ITC accounted and reconciled in GSTR 2A or GSTR 2B plus 5% of the above ITC up to maximum of ITC as per books

## Challenges Faced By Taxpayers

The restriction resulted in taxpayers being made responsible for their supplier's compliance to claim the ITC that is eligible otherwise.

The legal provisions that govern ITC claim based on supplier's actions are:

Provision	Gist Of The Provision
Section 16(2)(c)	ITC is entitled to be claimed by a taxpayer if the tax charged on such inward supplies is paid by the supplier to the government in GSTR 3B, amongst other conditions
Rule 36(4)	ITC is entitled to be claimed by a taxpayer only if the invoices have been uploaded by the supplier in their GSTR 1 or IFF
Rule 86A	If ITC has been claimed fraudulently or is ineligible due to the same not being paid to the government then such ITC can be restricted from being used and shall be blocked for a maximum period of one year, amongst other reasons
Section 16(2)(aa) (not yet notified)	ITC is entitled to be claimed by a taxpayer if the details of the invoice or debit note has been furnished by the supplier in their GSTR 1 and such details have been communicated to the recipient in the manner prescribed.







## Some Of The Challenges Faced By Taxpayers Are:

1

### Whether GSTR 2A Or GSTR 2B Should Be Considered For The Purpose Of Reconciliation?

For the period 9th October 2019 to 9th November 2020, Form GSTR 2B was not notified Hence, taxpayers will have to reconcile their ITC as per books of accounts with the ITC available in GSTR 2A. It's from 10th November 2020 that taxpayers have to choose between GSTR 2A and GSTR 2B for reconciliation.

Further, as per Rule 36(4) of the CGST Rules, 2017, the condition for claiming ITC only states that the supplier is required to file their GSTR 1 without referring to whether GSTR 2A or GSTR 2B should be used to verify the same. The differences of GSTR 2A and GSTR 2B is as follows:


GSTR 2A	GSTR 2B
Dynamic in nature – the invoices in 2A are updated as and when the supplier uploads invoices to GSTR 1 or IFF	Static in nature – the invoices in 2B are reflected for a certain period (between GSTR 1 and IFF due dates) after which it is reflected only in the GSTR 2B of the tax period it's filed in
The invoices appearing here are not auto populated in GSTR 3B	The invoices appearing here are auto populated in GSTR 3B
GSTR 2A is available since July 2017	GSTR 2B was notified from November 2020 but is available since August 2020
GSTR 2A reflects invoices only of a particular tax period regardless of when it's filed. Ex: Invoices of August 2021 will reflect in GSTR 2A of August 2021 even if the returns are filed after the due date	GSTR 2B reflects invoice of every period that is filed in a particular tax period. Ex: Invoices of August 2021 will reflect in GSTR 2B of September 2021 if they are filed in August 2021 GSTR 1 after the due date but in September 2021

While Rule 36(4) does not prescribe any form to refer to for identifying uploaded and missing ITC the CBIC has, however, informally stated that the form to be referred to for ITC reconciliation is Form GSTR 2B:

- In the instructions provided in Form GSTR 2B, the 'important advisory' states that taxpayers are advised to refer Form GSTR-2B for availing credit in Form GSTR-3B and the same was reiterated in a tweet on March 15, 2021, by the CBIC.
- In the 45th GST Council meeting held on September 17, 2021, it was stated that ITC would be restricted to invoices or debit notes communicated to a taxpayer in Form GSTR 2B.







Hence, GSTR 2B is the recommended form by the department to use for reconciliation and taxpayers should make an informed decision on its usage for reconciliation purpose.

## **2 Whether ITC Can Be Claimed If The Supplier Has Reported The Invoice As B2C**

Many taxpayers have faced this issue where the supplier mistakenly disclosed the invoice in their Form GSTR 1 as B2C invoice instead of B2B invoice. This means that such invoices will not reflect in Form GSTR 2A or GSTR 2B of the taxpayer.

As per Section 16(2)(c), the taxpayer can claim ITC only if the same has been paid to the government. It's only as per Rule 36(4) that the taxpayer must reconcile their invoices with GSTR 2A or 2B. Hence, the ITC is eligible in Section 16 but with the restriction imposed as per Rule 36(4).

Therefore, it's the department's view that reconciliation of invoices should be carried out to establish a correct claim on the ITC that taxpayers are eligible, and non-compliance may result in notices for discrepancies in ITC claimed in GSTR 3B and ITC available in GSTR 2A / 2B.

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## **Validity Of Claiming ITC On Invoices That Are Not Appearing In GSTR 2A Or GSTR 2B**

There are various petitions and applications filed by taxpayers before High Courts across India, challenging the legality of restricting ITC due to inaction by suppliers and a statement by the GST Council in their 27th council meeting on reversal of such ITC.



# 1


## Court Cases Against Section 16(2)(c), Rule 36(4) And Rule 86A–

Due to the provisions stated above, taxpayers were either faced with the higher cash flows due to invoices not being available in GSTR 2A or GSTR 2B or notices from the department for discrepancies in ITC claimed and ITC available. Some of those taxpayers chose to file petitions or applications with their jurisdictional High Courts for relief.

### ✓ Summary Of Judgements Or Cases Filed In High Courts

Particular	Judgement
Sec. 16(2)(c)	Madras High Court in WP 2127/2021 - D.Y. Beathel Enterprises Vs State Tax Officer  Held in favour of the Petitioner Taxpayer for the following reasons: <ul style="list-style-type: none"><li>• The tax liability must be paid to the government for the ITC being eligible to be claimed, and if not paid, then the liability may have to be eventually borne by one party, either the seller or the buyer.</li><li>• But if the seller has collected tax from the purchasers but has not remitted the same to the government then action must be initiated against the seller first and not the purchasing dealer.</li></ul>
Rule 36(4)	Chhattisgarh High Court in WP 94/2021 - M/s. Bharat Aluminium Company limited (BALCO) Versus Union of India and others  A Notice demanding the repayment of ITC claimed by BALCO, due to the invoices not appearing in GSTR 2A, stayed by the HC and is pending for adjudication
Rule 36(4)	Rajasthan High Court in Civil Writ Petition no. 6337/2020 by M/s Gr Infraprojects Limited  The constitutional validity of Rule 36(4) has been challenged, and the matter is pending for adjudication.
Rule 86A	Gujarat High Court in Special Civil Petition no. 6575 of 2021 by M/s Mili Enterprise  The WP is filed questioning the ambit of powers under Rule 86A and the matter is pending for adjudication





Along with the above cases, similar petitions are also pending in other High Courts for Rule 36(4) and Rule 86A.

Considering the above details, it seems that the issue of restricting ITC on the basis of tax not being paid, or invoices not being filed by the suppliers, may be settled only by the courts and it's only a matter of time before the matter reaches the Supreme Court for final adjudication.

Hence, due to the mounting number of cases filed in this regard, the government inserted Clause 16(2)(aa) in CGST Act, 2017 vide the Finance Act, 2021 but has not notified the same. The intention of the government by such an insertion is to avoid litigation, in the matter of ITC mismatch between GSTR 2A / 2B and GSTR 3B, by deeming only those ITC which have been uploaded and available in Form GSTR 2A / 2B as legitimate and eligible, amongst other conditions.

## 2

### **27<sup>th</sup> GST Council Meeting**

The GST Council, in their 27th meeting held on 4th May 2018 had released a statement that there would be no automatic reversal of credit for non-payment by supplier. The text is as follows:

*“No automatic reversal of credit: There shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however, reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.”*

Hence, the Council themselves were of the opinion that in case of ITC not paid or the invoices not uploaded by the seller, then the recovery should be from the seller and recovery from the buyer is only in exceptional circumstances. However, they have, contradictorily recommended the restriction of ITC only to the extent as available in Form GSTR 2B in their 45th GST Council meeting.

## CASE LAWS

# Union Of India Versus Bharti Airtel Ltd. & Ors. – Supreme Court In Civil Appeal No. 6520 OF 2021.

### Facts Of The Case

Bharti Airtel is a leading telecommunication company which had filed a writ-petition in the Delhi High Court on the following grounds. Their contention was that, during that FY 2017-18, they had filed their GSTR 3B returns by claiming ITC provisionally as per their books of accounts. However, in September 2018, Form GSTR 2A was released by the GST department and the company found that they were eligible to claim an additional Rs, 923 Crores of ITC for the FY 2017-18. Hence, the company filed the Writ Petition in the Delhi High Court pleading that they be allowed to amend their GSTR 3B for the period July 2017 to March 2018 so as to claim such remainder ITC and claim refund of the tax paid in cash to such extent, amongst other prayers.

The Delhi High Court allowed the petition in favor of Airtel. The GST Department, then appealed to the Supreme Court on the grounds that Section 39(9) of the CGST Act, 2017 allows for rectifications in their returns in subsequent period but within the given time limit and Circular No. 26/26/2017GST dated 29.12.2017 states that GSTR 3B cannot be amended and any adjustments for output tax or input tax can be made in subsequent months GSTR 3B returns but within the prescribed time limit.

### Judgement By The Supreme Court

The Hon'ble Supreme Court held that taxpayers are required to file their returns on self-assessment basis as per information available in their books of accounts, an activity that can be done even without the electronic portal and rectification of Form GSTR 3B can be made only in terms of Section 39(9) of the CGST Act, 2017 and if followed the taxpayer is not denied the opportunity of rectifying mistakes in their returns. Therefore, amendment of GSTR 3B is not possible as there are available remedies for rectification and thus, the order of the High Court is set-aside.



# Prodip Nandi – AAR West Bengal

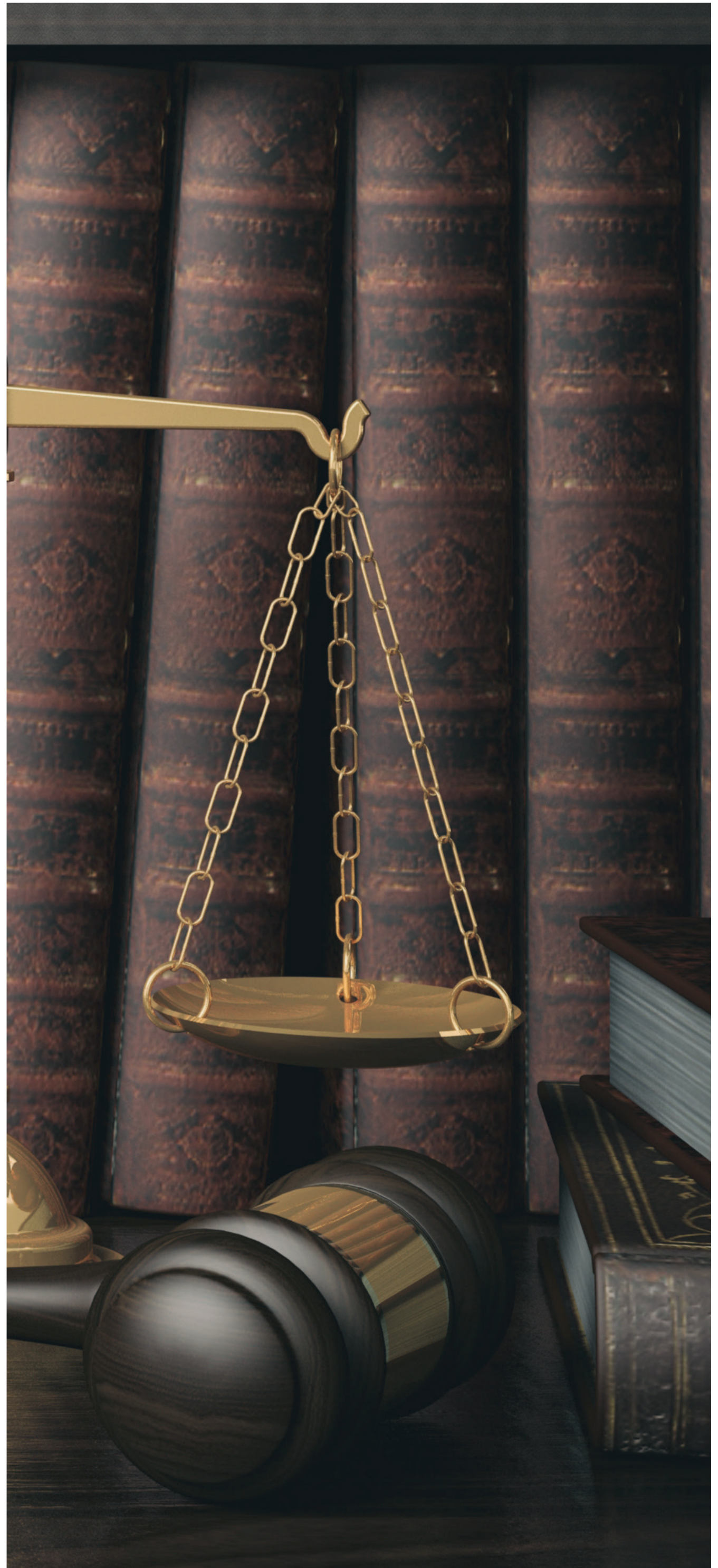
## Facts Of The Case

The applicant is engaged in supplying manpower services to his clients on daily/ monthly basis for different jobs as required by his clients and to make payment of salary/wages. Periodical invoices are raised to the clients indicating salary/ wages payable and also the service charges payable to the applicant separately. The Applicant has approached the AAR asking whether the applicant is acting as a pure agent and whether the payment of salary/wages by the supplier can be excluded from the value of supply.

The AAR referred to Rule 33 of the CGST Rules, 2017 regarding value of supply of services in case of pure agent and gave the following ruling:

## Ruling Of The AAR

The AAR held that no other services other than manpower services are provided by the applicant to his client. As per the “Employment Agreement’ made between the applicant and workman, the applicant, being the employer is liable to make payment to his employees. Further, the charges which are covered under Rule 33 are in the nature of compulsory fees levied on the party and the pure agent will have no choice but to recover such expenses and thus, it will not form part of supply. But, in the applicant’s case, he is the person who is liable to pay salary/wages to the work-men employed by him Therefore, the Applicant is not a pure agent in providing manpower services.





# NOTIFICATIONS AND CIRCULARS FOR THE MONTH OF OCTOBER 2021

✓ Two Central Tax Circular. - [Click here](#)

Sl. No	Subject	Notifications/Circulars No. Date of Issue
1.	Clarifications regarding applicable GST rates & exemptions on certain services.	164/2020/2021 Circular No. dt-06-10-2021
2.	Clarification regarding GST rates & classification (goods) based on the recommendations of the GST Council in its 45th meeting held on 17th September, 2021 at Lucknow-reg.	163/19/2021 Circular No. dt-06-10-2021

## DUE DATES OF GST FOR THE MONTH OF NOVEMBER 2021

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8	9	GSTR-7, GSTR-8 10	* GSTR-1 11	12	* IFF, GSTR-6 13
14	15	16	17	18	19	* GSTR-3B, GSTR-5/5A 20
21	* PMT-06/ GSTR-3B 22	23	* PMT-06/ GSTR-3B 24	25	26	27
28	29	30				

\* Monthly return for taxpayers with Annual Turnover more than Rs. 5 Crores or Taxpayer who has opted Monthly return option.

\* For taxpayers with Annual Turnover less than Rs. 5 Crores and opted for quarterly return option (QRMP); based on the State of the taxpayer.






# CONTACT US

## Mumbai Address

2nd Floor, Gita Building,  
Sion Circle, Sion (East),  
Mumbai – 400022

## Bangalore Address

No.8, 3rd Floor,  
VK COMMERCE, 3rd Main  
Rajajinagar 6th Block, Opp.  
IT Park, Bangalore - 560010

 +91 7738066622

 [info@incorpadvisory.in](mailto:info@incorpadvisory.in)

 [www.incorpadvisory.in](http://www.incorpadvisory.in)

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