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## "Supplier sins & Recipient repents...!"

### Part-IV

[In **Part I**, we had a brief look at the 4 (four) conditions prescribed in clauses (a) to (d) of S. 16(2) of the CGST Act, 2017 which are in force as on date and which a taxpayer is required to fulfill so as to be eligible to ITC.

In **Part II**, the statutory provisions relating to **FORM GSTR-2A** and their bearing on the entitlement of the taxpayer for availing ITC on the taxable supplies received by him were briefly analysed.

In **Part III**, the scope and intent of sub-rule (4) inserted in R.36 by Not. No. **49/2019-CT** dt. 09.10.2019 w.e.f. 09.10.2019 and its Constitutionality and validity were discussed.]

### FORM GSTR-2B - 'Oh, NO! One MORE Form?'

While the controversy surrounding the departmental action of denying ITC to the taxpayer on the basis of Form **GSTR-2A** was gathering serious traction, the GST Council, in its 39th Meeting held on March 14, 2020, recommended yet another Form for the convenience (?) of the taxpayers. The proposed Form was issued as '**Form GSTR-2B**' on an experimental basis in July, 2020 and finally in August, 2020, it was put into operation on a regular basis. Unfortunately, Form **GSTR-2B** had no statutory support or basis inasmuch as neither in the CGST Act, 2017 nor in the CGST Rules, 2017, was there any mention of **Form GSTR-2B** at the time when it was operationalized in August, 2020. Belatedly, the Central Government made an attempt to remedy this lacuna by issue of Notification No. **82/2020-CT** dated November 10, 2020. By this Notification, R. 59 and 60 have been substituted by a new set of Rules which have been given effect from January 01, 2021. It will be interesting to note that the substituted R. 59 does not refer to '**FORM GSTR-2A**' at all (unlike sub-rule (3) of the erstwhile R. 59 which was in force up to December 31, 2020.)

At the same time, the substituted Rule 60 now, inter alia, provides for the generation of both, '**FORM GSTR-2A**' and '**FORM GSTR-2B**'. [For the sake of brevity, the relevant text of the substituted R. 60 is not reproduced]. Readers will observe that by the substituted provisions, the Central Government has attempted to lend credibility and validity to the '**FORM GSTR-2B**' already put into operation by them in August, 2020, in addition to the then existing '**FORM GSTR-2A**'.

In short, effective from January 01, 2021, two Forms viz. **Form GSTR-2A** and **Form GSTR-2B** are being made available on the GSTN Portal to every taxpayer. These Forms contain the specified details as prescribed under the substituted Rule 60 with effect from January 01, 2021. However, both these

Forms differ in many respects. Without delving deep into this, suffice it to say that **Form GSTR-2A** is a '**Dynamic Form**', the details in which may undergo constant change, whereas, **Form GSTR-2B** is a '**Static Form**', the details in which remain unchanged. There are many other areas of differences between the two Forms but no discussion thereon is warranted here.

### **ITC vis-à-vis FORM 2A or 2B - '2B or not 2B?'**

The question that is uppermost in the minds of all stakeholders is "*which of **FORM GSTR-2A** or **FORM GSTR-2B** is relevant for availing ITC?*". Let us make an attempt to answer this burning question.

The most crucial point to be noted here is that it is not the responsibility of the taxpayer to file either **FORM GSTR-2A** or **FORM GSTR-2B** nor does the substituted R. 60 provide so. The words '*The details of outward supplies furnished by the supplier in FORM GSTR-1 or using the IFF shall be made available electronically to the concerned registered persons (recipients) in PART-A of FORM GSTR-2A...*' as used in sub-rule (1) of the substituted R. 60 and the words "*An auto-drafted statement containing the details of input tax credit shall be made available to the registered person in FORM GSTR-2B, for every month, electronically through the common portal ...*" used in sub-rule (7) of the said Rule make it clear that both, **FORM GSTR-2A** and **FORM GSTR-2B** are auto-drafted statements generated by the system based on the details of the outward supplies furnished by suppliers through **FORM GSTR-1** for the relevant period. These statements are to be made available electronically on common portal for perusal and scrutiny by the recipient-taxpayer.

Under these circumstances, Departmental action to deny the benefit of ITC to the recipient-taxpayer merely on the basis of non-availability of the details of outward supplies made by the supplier-taxpayer in its **Form GSTR-2A** or the **Form GSTR-2B** is absolutely unjustified and illegal. In the detailed Advisory issued by the GSTN relating to the **Form GSTR-2B**, it is clearly stated that the statement in **Form GSTR-2B** is intended for the convenience of the taxpayers who can undertake regular scrutiny as to the availability of ITC vis-à-vis outward supplies made by the supplier-taxpayer. In this Advisory, it is also stated that 'the taxpayers are advised to refer **FORM GSTR-2B** for availing credit in **FORM GSTR-3B**'. Unfortunately, a large number of taxpayers and tax professionals and needless to say, tax officers are swayed by this Advisory and treat the same as a legal mandate. Accordingly, a view is expressed by all that for availing the ITC, **Form GSTR-2A** has now become irrelevant and that the ITC benefit shall be reckoned only on the basis of the details available in **Form GSTR-2B**. This interpretation and understanding is absolutely misconceived and erroneous. First, the Advisory has no statutory binding force whatsoever. Second, in the absence of any statutory provision in the Act or the Rules, the eligibility of a taxpayer to claim the benefit of ITC cannot be made dependent, nor can it be restricted on the basis of **Form GSTR-2A** or **Form GSTR-2B**. In case, the details of any outward supply of a supplier taxpayer is not available in these Forms, it may be a cause for undertaking an investigation or scrutiny by both the stakeholders, viz. the recipient-taxpayer and the department, but merely on that basis, the recipient taxpayer cannot be denied the benefit of ITC.

In the end, it is rather strange and equally unfortunate that provisions which are intended for the convenience and caution of the taxpayers have become, not only a cause for a legal dispute, but also a matter of concern for taxpayers, considering the financial implications of this boiling issue.

### **New clause (aa) of S. 16(2) - The last nail in the (ITC) coffin...!**

As if the denying or restricting the ITC, albeit illegally or arbitrarily in the majority of the cases, on the basis of R. 36(1) and/or **FORM GSTR-2A** and/or **FORM GSTR-2B** and the disputes arising as a consequence thereof is not enough, yet another significant condition has been inserted in S. 16(2) by the Finance **Act, 2021**. A new clause (aa) inserted in S. 16(2) reads as under:

*"(aa) the details of the invoice or debit note referred to in clause (a) has been **furnished by the supplier in the statement of outward supplies** and such details **have been communicated to the recipient** of such invoice or debit note in the manner specified in Section 37."*

(Emphasis provided)

Before we proceed, it may be pointed out that though the aforesaid clause (aa) has become the part of the CGST Act, 2017 with the enactment of the Finance Bill, 2021 on March 28, 2021, it has not come into force to date. This clause and all other amending provisions of the Finance Act, 2021 relating to

GST shall come into force on the date to be appointed by the Central Government by a notification in terms of S. 1 (2)(b) of the said Finance Act, 2021.

One look at clause (aa) and it will be evident that it now seeks to accord statutory recognition to the intent and purpose of R. 36(4) and in fact, goes much beyond that. As per this clause, before the recipient taxpayer avails ITC on any inward supply, he will have to ensure that the condition prescribed in the clause also stands fulfilled. However, a careful reading of clause (aa) will show that it postulates 3 (three) things, viz:

- Furnishing of the details of invoice or debit notes by the supplier in the statement of outward supplies i.e. FORM GSTR-1;
- Communication of the aforesaid details to the recipient of such invoices or debit notes; and
- Communication to the recipient to be in the manner specified under S. 37.

It is, therefore, clear that even the new clause (aa) does not impose any responsibility on the recipient taxpayer in any manner and he is only expected to be a passive recipient of the information via Common Portal. (It's a different matter that later he may be made a victim having stood in the firing line!) It may be observed that the two players viz. the supplier and the Common Portal are only expected to act in the manner specified in S. 37. While the former shall file the statement in **FORM GSTR-1**, the latter shall communicate the details presumably in **FORM GSTR-2A** and/or **FORM GSTR 2B** or other prescribed forms, to the recipient taxpayer as provided under S.37. The questions that arise here are:

- Is the recipient taxpayer expected to follow the mandate of S.37 once he has been communicated the details of outward supplies in terms of the aforesaid clause (aa)?
- Can the recipient taxpayer be denied the ITC or be prevented from availing the ITC on the strength of clause (aa) merely for the reason of non-furnishing of the details of the outward supplies by the supplier?

The aforesaid two questions will require answers, and will need to be analysed on a conjoint and harmonious reading of the various provisions of the CGST Act, 2017 and the CGST **Rules, 2017**. As the new clause (aa) is yet to become operational, a detailed discussion on these issues is avoided at this stage.

One may also feel that there is some sort of overlap between the new clause (aa) and the existing clause (c) of S.16(2) inasmuch as if they are perceived as pre-conditions for availing ITC, both are 'supplier-centric' and seek to deny ITC to the recipient taxpayer on the basis of some fault or omission on the part of the supplier. Another significant aspect of clause (aa) is that when read, whether in isolation or in conjunction with clause (c), it seeks to deny the ITC in its entirety to the recipient taxpayer in case there is a failure or omission on part of the supplier to furnish the details of invoices/debit notes in the statement of outward supplies for any reason. The withdrawal/omission of sub-rule (4) [of rule 36] may, therefore, be on the cards once the new clause (aa) of S. 16(2) is notified and put into effect.

Insofar as the constitutionality and validity of the clause (aa) is concerned, the same shall be discussed in the concluding part in the context of clause (c) of S. 16(2) of the Act.

*[To be continued...]*

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