Supplier sins and Recipient repents - Part-V

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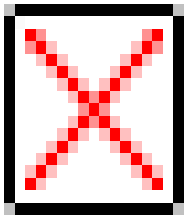
"Laws are like sausages. It's better not to see them being made."
[Otto von Bismarck, 19th Century Prussian Prince]



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 at this time, and which a taxpayer is required to fulfil 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.

In **Part IV,**
a brief look was taken at the statutory provisions governing Form GSTR-3B and its relevance for availing ITC, as well as at the newly introduced clause (aa) in S. 16(2) of the CGST Act, 2017.

The discussion is resumed in this Part. The author sincerely regrets the inordinate delay in penning this fifth part.]

Clause (aa) of S. 16(2) - 'Throttling the ITC lifeline!'

As explained earlier, the 4 (four) conditions prescribed in S.16(2) of the CGST Act, 2017 ('the Act') since its introduction, for a taxpayer to be eligible to avail the Input Tax Credit ('ITC') are:

- The recipient taxpayer is in possession of the tax invoice or debit note or any other specified taxpaying documents issued by the supplier in accordance with law [Section 16 (2)(a)];

- The recipient taxpayer has received goods or services or both [Section 16 (2)(b)];

- Subject to the provisions of Section 41 or Section 43A, the supplier has discharged tax liability on the supply made by him, in cash, or by debit to the admissible ITC relating to such supply [Section 16 (2)(c)];

- The recipient taxpayer has furnished the Return as prescribed under Section 39 [Section 16 (2)(d)].

Not surprisingly, the condition prescribed at clause (c) of S.16(2) has resulted in massive ITC related disputes, what with the Department arbitrarily invoking this provision against the taxpayers so as to deny the benefit of ITC to them. The invocation of this provision has been so rampant that the distinction between a bona fide transaction and a fraudulent transaction has almost disappeared!

While taxpayers have been facing the onslaught of action by the Department, yet another challenge has arisen for them in the form of clause (aa) introduced in S. 16(2) of the Act by the Finance Act, 2021. The new clause inserted by S. 109 of the Finance Act, 2021 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 under section 37;"***

It may be pointed out here that while the new clause became a part of the statute on March 28, 2021 i.e., the date of which the Finance Act, 2021 stood enacted, it is only with effect from January 01, 2022 that S. 109 of the Finance Act, 2021 has been brought into effect by Notification No.**39/2021-CT** dated 21.12.2021, thereby bringing the new clause lying as a dead letter till then to life.

A close reading of clause (aa) would reveal that as is the case with clause (c), it is essentially a 'supplier-centric' provision and does not impose any responsibility on the recipient taxpayer to perform any act. However, notwithstanding this 'supplier-centric' nature of both the clauses, the recipient taxpayer may, ironically as it may seem, lose the benefit of ITC if the supplier has not:

> - furnished the details of the invoices or debit notes for the relevant tax period in Form GSTR-1 and which have not been communicated to the recipient of the supply via Common Portal in Form GSTR 2B[clause (aa)]; and
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> - discharged the appropriate tax liability on the supplies made by him during the relevant tax period in accordance with law [clause (c)].

Before examining the issue of the constitutionality and validity of the clauses (aa) and (c) of S. 16(2), let us also have a look at the simultaneous amendment made to sub-rule (4) of Rule 36 of the CGST **Rules, 2017** ('the Rules') and its implications.

Rule 36 (4) - 'An orphan now finds parentageâ€¦!'

Close on the heels of the operationalization of clause (aa) in S. 16 (2), the much-maligned sub-rule (4) of Rule 36 of the Rules has also been substituted by a new sub-rule (4) by Notification No. **40/2021-CT**
dt. 29.12.2021 w.e.f. 01.01.2022. For ease of reference, the texts of sub-rule (4) as existing upto 31.12.2021 and the substituted sub-rule (4) effective from 01.01.2022 are reproduced below:

Sub-rule (4) as in force upto 31.12.2021:

> ***"(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been furnished by the suppliers under sub-section (1) of section 37, in FORM GSTR-1 or using the invoice furnishing facility shall not exceed 5 per cent of the eligible credit available in respect of invoices or debit notes the details of which have been [furnished]70 by the suppliers under sub-section (1) of section 37 [in FORM GSTR-1 or using the invoice furnishing facility.***
>
> ***Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.]***
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> ***[Provided further that such condition shall apply cumulatively for the period April, May and June, 2021 and the return in FORM GSTR-3B for the tax period June, 2021 or quarter ending June, 2021, as the case may be, shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.***

Substituted sub-rule (4) effective from 01.01.2022:

"(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under sub- section (1) of section 37 unless,-

(a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility; and

(b) the details of such invoices or debit notes have been communicated to the registered person in FORM GSTR-2B under sub-rule (7) of rule 60";

As will be observed, the erstwhile sub-rule (4) provided for a restricted availability of ITC even if the details of the invoices/debit notes for the relevant tax period have not been furnished by the supplier in terms of S.37 of the Act in Form GSTR-1 or by using Invoice Furnishing Facility (IFF). On the other hand, the substituted sub-rule (4) seeks to put an embargo on the availment of ITC if the supplier has not furnished the details of invoices/debit notes in Form GSTR-1 in terms of S.37 or by using IFF and such details have not been communicated to the recipient taxpayer through Form GSTR-2B in terms of Rule 60(7) of the Rules.

The issue of validity of the erstwhile sub-rule (4) has already been discussed in Part-III
and hence, the discussion is not repeated here. The substitution of sub-rule (4), riding piggyback on clause (aa) of S.16(2), it seems, at least vindicates the stand that the erstwhile sub-rule (4) was and has always been an invalid piece of legislation. The provision was like an 'orphan'! This is notwithstanding the feeble attempt to impart credibility to it by extending the benefit of restricted ITC in case of the unreconciled supplies.

It may be noted here that the erstwhile sub-rule (4) came into play only in case of the non-furnishing of the details of the invoices/debit notes by the supplier. The provision cannot be considered as either for the purposes of S.16(1) or S.16(2) of the Act. If the non-furnishing of the details by the supplier was to be inferred as non-payment of tax by the supplier - indeed, a common inference drawn by the Department - then said provision was not required at all inasmuch as clause (c) of S.16(2) took care of such a situation. Obviously, the Rule could not have granted even the restricted credit in such cases as it would then be ***ultra vires***
S.16(2)(c) of the Act. Merely because the quantum of the restricted ITC in such cases was based upon the total ITC available on the reconciled invoices, it would not make the erstwhile sub-rule (4) valid if the case of the department in the first place is that the condition of S. 16(2)(c) has been violated.

On the other hand, if the erstwhile sub-rule (4) is being justified as being 'for the purposes of S.16(1)', then the specific inclusion of clause (aa) in S. 16(2) is totally unwarranted and unnecessary. Readers may note that the substituted sub-rule (4) of Rule 36 is in sync with the new clause (aa) inserted in S. 16(2) and does not have any nexus with clause (c) of S.16(2). It is altogether a different matter that with the specific insertion of clause (aa) in S. 16(2), whether sub-rule (4), even in its substituted version, is really required at all?

While the discussion on this provision can continue ***ad infinitum*****,** let me conclude it by posing a few questions, lest the discussion becomes ***ad nauseam.*** Here are the questions:

- Under which clause of S. 164 was Notification No. **49/2019-CT**
dt. 09.10.2019 inserting the erstwhile sub-rule (4) in Rule 36 issued?

- Can the Notification be considered as having been issued under sub-section (1) of S. 164 as it was issued on the recommendations of the Council?

- For the purposes of which provision of the Act was the insertion of the erstwhile sub-rule (4) in Rule 36 meant?

- If non-furnishing of the details of invoices, etc. by the supplier is being inferred as 'non-payment of tax', how could the erstwhile sub-rule (4) of Rule 36 have allowed even the restricted ITC in disregard of S. 16(2)(c)?

- The substance of the erstwhile sub-rule (4) (except the grant of the restricted ITC) has now been embodied in new clause (aa) inserted in S.16(2) and the substituted sub-rule (4) may be considered as for the purposes of S. 16(2) (aa). However, what purpose has really been achieved by this merry-go-round?

- Does not the insertion of clause (aa) in S.16(2) and the substitution of sub-rule (4) establish that the erstwhile sub-rule (4) was an invalid provision?

"Nobody has a more sacred obligation to obey the law than those who make the law."

[Sophocles]Â

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