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5 Years of GSTR2A/GSTR2B [Is GSTR-2B a Bible of Input Tax Credit? or Section 16(2)(aa) is a mirror image of section 16(2)(c) vulnerable to challenge?]



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A study of the GST law, as enacted in its original form, relating to the claim of input tax credit (ITC, in short) reckons that these provisions are inextricably linked to the compliance related provisions and are wholly dependent on what the government has been touting i.e., a new concept of online matching. However, circumscribing the role of online matching to a manual matching had effectively shrunk the taxpayers girth. Much as in an era full of compliances, the taxpayers balked at not supporting such manual matching. The provisions regarding punishing a bona fide recipient for the errors, omissions or non-compliances on part of corresponding suppliers by way of disallowing the input tax credit is adding to cascading effect of taxes which has never been the objective for introducing GST. The chronological analysis of the law as it stood from time to time is done in this article to answer the question raised in subject of this article.

(A) Law during the period upto 09.10.2019

1. As per manner of doing compliances coded in the originally enacted

GST law, a supplier has to furnish the details of outward supplies in Form GSTR-1 which auto-populates in Form GSTR-2A of the recipient. The recipient can accept, modify, delete or add the details auto-populated in Form GSTR-2A to file his statement of inward supplies in Form GSTR-2. On the basis of data furnished in Form GSTR-1 and GSTR-2, return in Form GSTR-3 auto-populates wherein the payment of taxes are made. If the taxes are paid in full, said return is considered as a "valid return" and is taken up for matching by the GSTN portal. If the full payment of taxes is not made, the return is not taken up for matching and ITC claimed by the recipient would be communicated as unmatched leading to payment of taxes to the extent of mis-match.

2. On account of failure to introduce Form GSTR-2, GSTR-3 and to enforce matching through common portal, the recipients were always in dilemma over manner to ensure compliance with matching of ITC. A stop-gap arrangement was introduced by way of inserting Rule 61(6)¹ in the GST Rules which provided that as and when GSTR-2 and GSTR-3 would be filed, the system will provide for reconciliation of all claims in Form GSTR-3. In Form GSTR-3, the figures as per Form GSTR-1, GSTR-2, GSTR-3B will auto-populate; figures auto-populated for Form GSTR-3B would be editable in nature, and adequate adjustment towards balancing amounts would be given which can either be additional payment of taxes or additional claim of ITC or vice-versa. Rule 61(6) reads as under :

"(6) Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2-

- (a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period;*
- (b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR-3 and discharge his tax and other liabilities, if any;*
- (b) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM*

GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person."

3. Therefore, the taxpayers expected for Form GSTR-2 and Form GSTR-3 to be made effective wherein all the required rectifications would be carried out. However, the government left all taxpayers in a limbo by retrospectively omitting said sub-rule on 09.10.2019 vide Not. No. 49/2019-CT dated 09.10.2019. As a result thereof, taxpayer's right to do rectifications were retrospectively taken away which led to a huge round of litigation and the industry was representing to Government as 'What would emerge from all that shoving and jostling?'

4. Hon'ble Supreme Court in the case of *Union of India v. Bharti Airtel Ltd.* [20121] 131 taxmann.com 319/[2022] 89 GST 1 as stated that though the question regarding validity of said retrospective amendment is not before us but it is made clear that section 39(9) is the parent provision which provides that error or omission, if any, are to be rectified in return to be filed for the month in which they are observed. The relevant paras are reproduced herein below for reference :

" 37.The express provision in the form of section 39(9) clearly posits that omission or incorrect particulars furnished in the return in Form GSTR-3B can be corrected in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed. This very position has been restated in the impugned Circular. It is, therefore, not contrary to the statutory dispensation specified in section 39(9) of the Act."

39. In that, allowing filing of return in Form-GSTR-3B albeit a stop gap arrangement, is ascribable to Section 39 of the 2017 Act read with Rule 61 of the 2017 Rules. Indeed, it is not comparable to the mechanism specified for electronically generated Form GSTR-3 referable to Rule 61. Nevertheless, Form GSTR-3B is prescribed as a "return" to be furnished by the registered person and by the subsequent amendment of Rule 61(5) brought into force with effect from 01.07.2017² , it has been clarified that such person need not furnish return in Form GSTR-3 later on. Notably, the validity of that amendment including that of Notification dated 09.10.2019 bearing No. 49/2019 : MANU/CGST/0051/2019, is not put in issue before us.

Obligation to do Self-Assessment: A taxpayer's preparatory work

5. Hon'ble Supreme Court upheld that taxpayer's have to self-assess their claims of ITC in the returns filed for respective tax periods and if any error or omission is observed, the same has to be rectified in Form GSTR-3B filed for the tax period in which said error or omission is observed. This judgment is a latest example in litany of cases. It undoubtedly provides that rule 61(6) was ultra-vires to the section 39(9) of the GST Act and therefore, taxpayer cannot claim that his claim for rectification can be entertained in terms of said sub-rule. However, it cannot be ignored that the question of validity of retrospective amendment dated 09.10.2019 is yet not discussed.

6. Further, the obligation to do self-assessment by the taxpayer cannot be ignored. Section 38(1) read with rule 60(1)³ as well as the Supreme Court emphasized that **preparatory work** for claim of ITC has to be done by the assessee himself. The role of electronic communication between registered persons in Form GSTR-1A, or of matching in terms of section 42 and 43 of the GST Act comes thereafter. At first, the assessee has to self-assess his claim of ITC. At this juncture, it is relevant to refer the relevant paras of the ***Bharti Airtel Ltd. (supra)*** wherein Hon'ble Supreme Court observed as under :

*"33. As per the scheme of the 2017 Act, it is noticed that registered person is obliged to do self-assessment of ITC, reckon its eligibility to ITC and of OTL including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of accounts required to be statutorily preserved and updated from time to time. That he could do even without the common electronic portal as was being done in the past till recently pre-GST regime. **The common portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment.** The primary source is in the form of agreements, invoices/challans, receipts of the goods and services and books of accounts which are maintained by the Assessee manually/electronically. These are not within the control of the tax authorities. This was the arrangement even in the pre-GST regime whilst discharging the obligation under the concerned legislation(s). The position is no different in the post-GST regime, both in the matter of doing self-assessment and regarding dealing with eligibility to ITC and OTL. Indeed, that self-assessment and declarations would be any way subject to verification by the tax authorities. The role of tax authorities would come at the time of verification of the declarations and returns submitted/filed by the*

registered person.

36. Section 59 does make reference to section 39, which deals with furnishing of returns, but the fact remains that for furnishing of returns, preparatory work has to be done by the Assessee himself and is not fully or wholly dependent on the common electronic portal for that purpose....."

7. A key observation to be noted from *Bharti Airtel Ltd.'s* case (supra) is that the taxpayers must self-assessee their claims in the returns furnished under the Act. This is completely independent of deciding on the validity of other provisions like matching with Form GSTR-2A/2B. Hence, if a taxpayer forms a view that input tax credit as per books of accounts is to be claimed in the returns, he shall self-assess said claim in his returns. Once this is done, the validity of said claim can be decided by the Court otherwise not.

Supplier shall pay tax to the Government: A condition to claim ITC

8. At this point, it is relevant to refer the provisions regarding conditions to claim ITC given under section 16(2) of the GST Act basis which we can begin to decipher what happened from time to time. Section 16(2) provides as under :

"Section 16- Eligibility and conditions for taking input tax credit

(2) 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;

b. he has received the goods or services or both

c. subject to the provisions of section 41, 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:

9. A registered person is entitled to the credit of input tax inter-alia on the condition that the corresponding supplier has actually paid the tax in respect of said supply to the Government. However, this condition was subject to the provisions of section 41 which provides that the entire self-assessed input tax shall be credited to the electronic credit ledger on a provisional basis, and said claim would be matched with the valid return furnished by the corresponding suppliers i.e., a return in which corresponding supplier has made full payment of self-assessed taxes furnished in Form GSTR-1.

(B) Law during period from 09-10-2019 to 31-12-2020

An attempt made by Government to ensure matching manually: Shifting the entire focus of condition as per section 16(2)(c) to availability of invoice in Form GSTR-2A

10. Having observed huge unmatched credit and failure to implement electronic matching, it was decided in 37th GST Council Meeting held on 20th September 2019 that a reasonable restriction shall be imposed on credits appearing in Form GSTR-2A so that amount of unmatched credit be reduced and taxpayers are encouraged to declare the details of supplies in Form GSTR-1. Therefore, the Government inserted a sub-rule (4) in Rule 36 w.e.f. 09-10-2019 wherein the capping of 20% (reduced to 10% w.e.f. 01-01-2020, to 5% w.e.f. 01-01-2021) was introduced over invoices appearing in Form GSTR-2A subject to which ITC can be claimed in returns. Said sub-rule reads as under :

*"(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 **uploaded by the suppliers under sub-section (1) of section 37, shall not exceed 20 per cent.** Of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37."*

11. By doing so, the recipients were made liable to match the ITC manually. It was clear that the entire focus has been shifted from ensuring the compliance with condition regarding payment of taxes by corresponding supplier i.e., section 16(2)(c), to the presence of invoice in Form GSTR-2A though without any corresponding provision in this regard being there in the statutory paper book.

(C) Law during period from 01-01-2021 to 31-12-2021

Static statement of ITC introduced in Form GSTR-2B w.e.f. 01-01-2021

12. The difficulty of taxpayers was also prevailing on account of dynamic nature of Form GSTR-2A which kept on updating as and when any statement in Form GSTR-1 for the relevant tax period was filed by the corresponding supplier. This dynamic nature pace up with the introduction of e-invoice wherein the invoices started to auto-populate in Form GSTR-1 of the supplier as well as Form GSTR-2A of the recipient on T+2 day.

13. Simultaneously, the department was proceeding against taxpayers based on amounts of Form GSTR-2A as on a particular date. Since the Form GSTR-2A was dynamic in nature, by the time notice was prepared and served on the taxpayer, the amounts vary significantly. This led to situations wherein the jurisdictional officers were not able to adjudicate the issue because there were no means to verify the balance in Form GSTR-2A as on a particular date. Hence, the government introduced a static statement in Form GSTR-2B w.e.f. 01.01.2021 and the taxpayers were asked to adopt the same as a 'Bible of input tax credit'.

14. Though the bandwidth of 5% as per Rule 36(4) continued to govern the field during this period.

(D) Period from 01-01-2022 onwards

Section 16(2)(aa) made effective w.e.f. 01-01-2022: A mirror image of section 16(2)(c)

15. As a last step in validating the task of preparing statement of inward supplies based on presence of document in Form GSTR-2B, vide Finance Act 2021, the conditions to avail ITC as per section 16(2) were modified to insert a new clause (aa) which was made effective from 01.01.2022 *vide* Not. No. 39/2021-CT dated 21-12-2021. Accordingly the rule 36(4) was substituted w.e.f. 01-01-2022 vide Not. No. 40/2021-CT dated 21-12-2021. Said provisions 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

Rule 36 (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."*

16. Section 41, as amended vide Finance Act, 2021 and section 42, as stood omitted vide Finance Act, 2021, both **w.e.f. dates to be notified** reckons that onerous condition of section 16(2)(c) has been liberalised to the extent that credit would now be available as and when the tax is paid by corresponding supplier. Amended section 41 and relevant portion of section 42 as stood omitted reads as under :

"41. Availment of input tax credit

(2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest, by the said person in such manner as may be prescribed:

Provided that where the said supplier makes payment of the tax payable in respect of the aforesaid supplies, the said registered person may re-avail the amount of credit reversed by him in such manner as may be prescribed.

17. Prior to the amendments made vide Finance Act 2021, the ITC disallowed on account of mis-match with GSTR-2A was allowed (in the form that OTL earlier added in the return of recipient is allowed to be reduced) if the corresponding supplier makes the payment of taxes within time specified under section 39(9) of the GST Act. With these changes made by Finance Act, 2021, said restriction stands liberalised.

18. The operational law w.e.f. 01-01-2022 effectively is as under :

18.1. Once an e-invoice is generated, it gets auto-populated in Form GSTR-1 of the supplier and Form GSTR-2A of the recipient on t+2

days. On filing of Form GSTR-1, said invoice auto-populates in Form GSTR-2B of the recipient.

18.2. If e-invoice is not applicable, then the supplier furnishes details of outward supplies in Form GSTR-1 and the same auto-populates in Form GSTR-2A of the recipient. Pursuant to filing of Form GSTR-1, said invoice auto-populate in Form GSTR-2B of the recipient.

18.3. If the supplier does not furnish return in Form GSTR-3B, he is restricted from the facility of filing Form GSTR-1 for the next tax period. The supplier would not be able to generate the E-Way Bill as well.

18.4. If the supplier furnishes the return in Form GSTR-3B but with lower tax liabilities or with any other anomalies, the proper officer has the power to suspend the registration under rule 21A(2A) of the GST Rules.

Note: W.E.F. 01-01-2021, the government inserted sub-rule (6) in rule 59 restricting the facility to furnish statement in Form GSTR-1 if the return in Form GSTR-3B for preceding two months (later on reduced to "preceding month" w.e.f. 01.01.2022) has not been filed; sub-rule (2A) was inserted in rule 21A providing for suspension of registration in case significant difference or anomalies are observed *inter-alia* in Form GSTR-1 and GSTR-3B.

Reducing the condition for payment of taxes to a dead letter

19. Therefore, with above provisions being inserted like restricting the facility to furnish statement of outward supplies in Form GSTR-1 in the event of non-filing of return in Form GSTR-3B, suspension of registration if there are significant anomalies or differences in balances as per Form GSTR-1 and GSTR-3B, blocking of the facility to generate E-way bill etc., the condition of payment of taxes by the corresponding supplier has been effectively reduced to a dead letter. The entire focus, in nutshell, has been shifted to the availability of invoice in Form GSTR-2B. If an invoice is appearing in Form GSTR-2B, practically, it would be a tax paid invoice.

20. Having understood the operational law, it becomes quite uncertain to analyse the coverage of section 16(2)(c) read with section 41, as amended by Finance Act, 2021. It appears to the author that said

provisions would cover only handful of situations wherein a supplier has furnished GSTR-1 but not filed GSTR-3B for one tax period only. Because from the subsequent tax period, he would not be allowed to furnish the GSTR-1 which would not result in auto-population of invoice in Form GSTR-2B and hence, violating the newly inserted condition of section 16(2)(aa) as well.

21. Therefore, the moot question still remains i.e., 'whether a bonafide recipient can be punished for error or omission on part of corresponding supplier and more particularly in the absence of procedure to verify the compliance with condition of payment of taxes by corresponding supplier to the Government?' The answer is straight 'NO'.

22. In their efforts to enforce the matching manually, it appears to the author that government has created a mirror image of section 16(2)(c) in the form of section 16(2)(aa), might be, in order to safeguard themselves from the applicability of judicial precedents on the subject (*Ref: On Quest Merchandising (P.) Ltd. v. Government of Delhi* [2017] 87 taxmann.com 179/164 GST 623 (Delhi), *SLP dismissed by SC vide order dated 10-01-2018*).

Conclusion

23. Going by the reasoning given by Hon'ble Supreme Court in the case of *CIT v. Vatika Township (P.) Ltd.* [2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466, it appears that government may argue that amendment made by way of inserting section 16(2)(aa) has to be considered as a clarificatory amendment and hence, shall govern the field at all times since 01.07.2017. However, in view of the author, the government has effectively or say indirectly reduced the provisions of section 16(2)(c) to a dead letter in backdrop of rule 59(6), suspension of registration under rule 21A(2A), blocking of e-way bill, amended section 37(4) of the GST Act. In other words, section 16(2)(aa) is a mirror image of section 16(2)(c). Therefore, still the arguments put forth for validity of section 16(2)(c) hold good for validity of section 16(2)(aa) as well.

24. Hence, we may expect bonadife recipients would not be made victim of non-compliance at the end of supplier and their ITC isn't expected to be held as ineligible. It is strongly advised to make self-

assessment of ITC claims as per books of accounts in the returns filed for a relevant tax period in Form GSTR-3B. This is also observed by Hon'ble Supreme Court in the case of ***Bharti Airtel Ltd. (supra)***.

A. Concluding the position of law till 31-12-2020

25. For FY 2017-18, 2018-19, 2019-20 (upto 09.10.2019), the taxpayer can argue that ITC availed on self-assessment basis in Form GSTR-3B shall be allowed and the matching should not be enforced manually. Even proviso to rule 69 provides for the same. Further, during this period the condition to avail ITC was not based on reflection of invoice in Form GSTR-2A.

Note: The validity of retrospective amendment has not been tested by Hon'ble Supreme Court in the case of ***Bharti Airtel Ltd. (supra)***. Therefore, this question of law is still subject to judicial scrutiny.

26. For FY 2019-20 (from 09.10.2019), FY 2019-20, FY 2020-21 (upto 31-12-2020), if the claim of taxpayer falls within the bracket of 20% and 10%, as the case may be, the department is not expected to make a demand. However, it can be argued that ITC claimed as per books of account is proper.

B. Concluding the position of law from 01-01-2021 to 31-12-2021

27. A registered person can refer the Forms GSTR-2A and GSTR-2B ***to ascertain*** his ITC. As per section 38(1), he is entitled to add the details of ITC in case details are not appearing in Form GSTR-2A/2B. Therefore, claims can be made on self-assessment basis even during this period.

28. Rule 36(4) providing for cap of 5% shall be considered as ultra-vires to the GST Act. If such unmatched / excess claim falls within aforesaid limit of 5%, the department is not expected to proceed against the taxpayer.

Common points

29. The validity of section 16(2)(c) can be challenged and has been challenged in plethora of judgments. A bonafide recipient cannot be punished for the fault of corresponding supplier and he cannot be expected to do the impossible.

30. The taxpayer's are advised to have proper communication with corresponding suppliers regarding non-furnishing of invoice in GSTR-1 which is not appearing in Form GSTR-2A and hence, in Form GSTR-2B.

31. Without prejudice, ITC can be claimed on the basis of Form GSTR-2A. Meaning thereby, if a particular invoice is appearing therein but not in Form GSTR-2B, the credit can be claimed.

C. Position of law from 01-01-2022 onwards

32. With effect from 01.01.2022, amendment have been made in GST Act to provide that ITC shall strictly be taken in terms of Form GSTR-2B in respect of those supplies the details of which are required to be furnished by supplier under section 37(1). However, newly inserted provision i.e., section 16(2)(aa) is a mirror image of section 16(2)(c) and is still vulnerable to judicial scrutiny. In case taxpayer wishes to contest said provision for constitutional validity, ITC must be claimed as per books of account.

As a precautionary measure, the ITC availed to the extent of mis-match with Form GSTR-2A/2B can be kept unutilised. Doing so, the taxpayers would not face interest as well as penalty consequences. An intimation to this effect shall also be given to the jurisdictional officer.



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1. Not. No. 17/2017 CT dated 27-07-2017
 2. Mentioned as "01-01-2017" in the judgment which is merely a typing error.
 3. Refer language prior to 01-01-2021