

Analysis of the Hon'ble Supreme Court Judgement in the matter of Union of India v. Bharti Airtel Ltd. and Others (2021):

The Hon'ble Supreme Court of India in the matter of *Union of India v. Bharti Airtel Ltd. and Others* [CIVIL APPEAL NO. OF 2021 (ARISING OUT OF S.L.P. (C) NO. 8654 OF 2020) dated October 28, 2021] did not permit telecom giant Bharti Airtel i.e. The Respondent from seeking GST Refund of ₹ 923 crore by rectifying its GSTR-3B return.

Facts of the case:-

The brief facts of the case were that the Respondent could not properly determine the Input Tax Credit available to them for the period of July 2017 to September 2017 since GSTR-2A was non-operational at that point in time and after utilizing the amount of Input Tax Credit determined by them at that point in time, filed their GSTR-3B returns and paid their Output Tax liability to the extent of Rs. 923 Crore in cash instead of paying such Output Tax Liability by utilizing such amount of undetermined Input Tax Credit which was otherwise available to them and they may have utilized it had it been known to them. The Respondent has, therefore, asked for rectification of such GSTR-3B Returns and have sought for refund of excess amount paid of Rs. 923 Crores.

Delhi High Court Judgement:-

The Delhi High Court [W.P. (C) No. 6345 of 2018 dated May 05, 2020] – Held that the rectification of the return for the very same month to which it relates was important and, accordingly, disregarded para 4 of the *Circular No. 26/26/2017-GST dated December 29, 2017* to the extent that it restricts the rectification of Form GSTR-3B in respect of the impugned period in which such error had taken place.

Accordingly, the Delhi HC allowed the present petition and permitted the Respondent to rectify Form GSTR-3B in regard to the period to which the error relates, i.e. the period from July, 2017 to September, 2017. The Delhi HC also directed the Respondents that on filing of the rectified Form GSTR-3B, they shall, within a period of two weeks, verify the claim made therein and give effect to the same once verified.

In July 2020, the Central Government i.e. the Appellant moved to the Apex Court challenging the Delhi High Court order of grant of refund and allowing rectification of GSTR-3B of the impugned period. While GST authorities claimed the Respondent had under-reported Input Tax Credit from July, 2017 to September 2017, the Respondent said it had paid excess tax to the tune of ₹ 923 Crore on inputs based on estimates and approximation since the Form GSTR-2A was not operational during such period.

Key highlights of the Supreme Court Judgement:

The Supreme Court [CIVIL APPEAL NO. OF 2021 (ARISING OUT OF S.L.P. (C) NO. 8654 OF 2020)]– Allowed the Appellant’s plea against the Delhi High Court Order that had directed to issue the tax refund to the Respondent by rectifying its GST return for the impugned period. Several key highlights of this landmark judgement are provided hereunder:

- 1) The Hon’ble Supreme Court passed its judgement stating that GST is to be determined on a self-assessment basis as per the charging Section 9 of CGST Act, 2017 and Section 5 of IGST Act, 2017 by claiming Input Tax Credit as per Section 16 and can pay the output tax liability either by the Electronic Cash Ledger or the Electronic Credit Ledger.
- 2) The Hon’ble Supreme Court had cast the responsibility to determine the Input Tax Credit on the Respondent i.e. Bharti Airtel and to use such Input Tax Credit in order to discharge

the Output Tax Liability. Payment of output tax liability by electronic cash ledger is merely a means to discharge such tax liability which could have otherwise been discharged by utilizing the electronic Credit Ledger had the amount been determined. Despite the availability of funds in the electronic credit ledger, the Respondent opted to discharge the output tax liability by using the E-cash Ledger. That is a discretion exercised by the Respondent for which the tax authorities have no control, whatsoever, nor they have any role to play in that regard. This may be understood to be a scenario of only a postponement of availment of Input Tax Credit since such credit could have been availed in the subsequent returns including the next financial year and may have remained intact in the electronic credit ledger.

- 3) GSTR-2A statement which consists of Input Tax Credit that is auto-populated and the automated GST return system of GSTR-1, GSTR-1A, GSTR-2 and GSTR-3 provided through GSTN common network are facilities used for procedural facilitation and in the event of it not being implemented, the taxpayer cannot be extricated from its duty to determine its Self-Assessment Tax and to make the payment of tax in a manner required which may be either through the E-cash ledger or the E-credit ledger and since the Respondent had exercised its right to determine the available Input Tax credit, had determined its tax liability and had exercised the manner of payment of output tax through E-cash ledger, it cannot amend its GSTR-3B return and hence it is not entitled to apply for refund of Rs. 923 Crore which was earlier paid by E-cash ledger.
- 4) Further, there is no express provision allowing swapping of entries effected in the electronic cash ledger vis-a-vis the electronic credit ledger or vice versa under the GST Law.

- 5) The Apex court stated that GSTR-2A/GSTR-2B statements can be termed only as *enablers and facilitators or facilities for procedural facilitation* in aiding to fulfil the primary obligation of the registered taxpayer which is that of self-assessment of output tax liability by considering and computing the available and eligible Input Tax Credit, therefore, seemingly the right to claim Input Tax credit should not be rejected in case such credit doesn't appear in GSTR-2A/GSTR-2B.
- 6) The primary obligation of the registered taxpayer is to compute output tax liability on the basis of self-assessment using primary source of information in the form of statutory books of accounts, invoices/challans, receipts of supplies, agreements and other records whether maintained in manual or electronic mode rather than being wholly dependent or mandatorily using details available on the common portal including details as provided in Form GSTR-2A/2B, which is only a facilitator to use such information and need not be the primary source to determine Output Tax liability under Self-assessment basis.
- 7) The Hon'ble Supreme Court has stated that the reconciliation of Input Tax Liability between GSTR-1 and GSTR-2A/2B should not affect the computation of self-assessment of output tax liability and therefore claiming only such Input Tax Credit for which the details are available in GSTR-2A/2B should not be tenable.
- 8) On the issue of reading down of the Circular No. 26/26/2017-GST by the Delhi High Court, the Apex court stated that *"The express provision in the form of Section 39(9) clearly posits that omission or incorrect particulars furnished in the return in Form GSTR3B 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.” Therefore, reliance on Circular No. 7/7/2017-GST dated 1st of September 2017 by the Respondent on amendment of any details furnished in GSTR-3B in the same month itself in GSTR-1 and GSTR-2 was not tenable.

- 9) Resultantly, the Respondent was told by the Apex Court that it *“it was not open to the High Court to proceed on the assumption that the only remedy that can enable the assessee to enjoy the benefit of the seamless utilization of the input tax credit is by way of rectification of its return submitted in Form GSTR-3B for the relevant period in which the error had occurred -cannot be permitted to unilaterally carry out rectification of its returns, submitted electronically in Form GSTR-3B, which inevitably would affect the obligations and liabilities of other stakeholders, because of the cascading effect in their electronic records.”* Since, the Respondent was responsible to self-assess its output tax liability using the statutory records, invoices, agreements, receipts and the books of accounts at disposal and cannot be considered to be wholly dependent on the functioning of GSTR-2A to provide details of available Input Tax Credit in order to compute the output tax liability for the impugned period, the assumption of Delhi High Court that the only resort which had been available in order to enjoy seamless utilization of Input tax credit is now by way of rectification of GSTR-3B should not be tenable. Also, a unilateral rectification of particulars in GSTR-3B return by the Respondent shall impact the obligations and liabilities of recipients and suppliers to the concerned transactions which may not be justified at the moment.
- 10) The Apex court was also prejudiced by the fact that the Respondent is not denied of the opportunity to rectify omission or incorrect particulars, which he could have done in the return to be furnished for the month or quarter in which such omission or incorrect particulars were noticed. Thus, it is not a case of denial of availment of Input Tax Credit as such.

- 11) The Apex court also did not approve the Gujarat High Court verdict in AAP & Co Chartered Accountants through Authorized Partner vs. Union of India & Ors, that GSTR 3B was only a temporary stop gap arrangement and not a return. The Apex Court subscribed to the view that where GSTR-3B is furnished, GSTR-3 need not be filed as per amendment to Rule 61(5).
- 12) The Apex Court stated in its order that, *“As noted earlier, the matching and correction process happens on its own as per the mechanism specified in Sections 37 and 38, after which Form GSTR3 is generated for the purposes of submission of returns; and once it is submitted, any changes thereto may have cascading effect. Therefore, the law permits rectification of errors and omissions only at the initial stages of Forms GSTR1 and GSTR3, but in the specified manner. It is a different dispensation provided than the one in pre GST period, which did not have the provision of auto-populated records and entries.”* Even in the case of automated GST Return filing of GSTR-1/2/3 model, which never got implemented, the rectifications in GSTR-1 and GSTR-3 would have been permissible only in the initial stages to prevent unwarranted cascading effects to concerned parties such as recipients and suppliers.

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