

How would Supreme Court judgement in Union of India Vs Bharti Airtel Ltd. & Ors prove to be beneficial to taxpayers who receive notices of mismatch of Input Tax Credit available as per GSTR-2A/2B and that claimed in GSTR-3B?

The said Supreme Court Judgement shall prove to be beneficial in defending instances of blocking of Input Tax Credit under Rule 86A of CGST Rules, 2017 wherein such ITC is termed fraudulent in nature due to the same being claimed not as per the available Input Tax Credit in GSTR-2A/2B. Since, the said judgement states that the presence of Input Tax Credit in such procedural facilities i.e. GSTR-2A/2B provided by GSTN network doesn't entitle or provide the right to claim such Input Tax Credit, relevant reference may be provided of the said judgement in drafting replies to such notices.

Several pointers of creating a defence against notices of mismatch of ITC can be extracted from the said Supreme Court Judgement and such pointers along with relevant extracts from the judgement are presented hereunder:

- 1) As per the said Supreme Court Judgement, GSTR-2A/GSTR-2B have been termed only as *enablers and facilitators or facilities* and that for *procedural facilitation* in aiding to fulfil the primary obligation of the registered taxpayer of self-assessment of output tax liability and Input Tax Credit, therefore, the right to claim Input Tax credit should not be rejected in case such credit doesn't appear in GSTR-2A/GSTR-2B.

The relevant extracts from the text of the Judgement to substantiate the above-mentioned point are provided hereunder:

“22. The functions or features provided in the common electronic portal of auto matching and auto populating of the record of the supplier and the recipient and vice versa are only a facility made available to the registered person.”

“20. Indeed, the registered person has been provided with a common electronic portal or tax electronic portal, which is **only an enabler and a facilitator** in bringing on board all the registered

persons which include the supplier, recipient, registered person and other recipients. **The efficacy of common electronic portal or so to say malfunctioning thereof, does not extricate the registered person from the primary obligation of self assessment of OTL as predicated in Section 16 of the 2017 Act."**

"46. Form GSTR-2A is only a facilitator for taking an informed decision while doing such self-assessment."

- 2) 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. Therefore, claiming only such Input tax Credit which are appearing in such forms cannot be mandated.

The relevant extracts from the said judgement to support this rationale are provided hereunder:

"46....of statutory obligation fastened upon the registered person to maintain books of accounts and record within the meaning of Chapter VII of the 2017 Rules, which are primary documents and source material on the basis of which selfassessment is done by the registered person including about his eligibility and entitlement to get ITC and of OTL. Form GSTR-2A is only a facilitator for taking an informed decision while doing such self-assessment."

“33. 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 preGST 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.”

“24. For doing the self-assessment, the registered person is fully equipped with accounts and records maintained by him as per the statutory requirement, which are in his complete control and knowledge.”

“32. whether the writ petitioner was required to be fully or wholly dependent on the auto generated information in the electronic common platform for discharging its obligation to pay OTL for the relevant period between July and September 2017. The answer is an emphatic No.”

- 3) Instead, the right to claim Input Tax Credit depends on the fulfilment of four currently notified conditions as provided under Section 16(2) which are as follows:
- a) Possession of tax invoice or debit note
 - b) Receipt of goods or services or both
 - c) The tax charged has been paid to the Government by the supplier
 - d) The recipient of supply has furnished his GST Return u/s 39 i.e GSTR-3B

The relevant extracts from the said judgement to support this rationale are provided hereunder:

“21. He can avail of ITC on the conditions specified in Section 16(2) read with Sections 41 and 49(2) of the 2017 Act. As per Section 59 of the 2017 Act, every registered person is required to self-assess the taxes payable under the 2017 Act and furnish a return for each tax period as specified under Section 39 of the 2017 Act.”

“34. Section 16 of the 2017 Act deals with eligibility of the registered person to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business.”

- 4) The recipient of supply shall not be disentitled to claim Input Tax Credit since the same may not be appearing in GSTR-2A/2B due to the fault of the supplier. 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.

The above rationale seems logical since in several instances the Input Tax Credit doesn’t appear in GSTR-2A/2B due to the mistakes of the supplier such as:

- a) B2B transaction mistakenly reported as B2C in GSTR-1 by the supplier.
- b) Incorrect GSTIN provided for B2B transaction reported in GSTR-1 by the supplier.
- c) Incorrect Place of Supply has been provided in GSTR-1 by the supplier.
- d) An intra-state supply mistakenly reported as inter-state and vice versa.

The relevant extract from the said judgement to support this rationale is provided hereunder:

“23. Further, reconciliation predicated under Sections 37 and 38 between the outward supplier, registered person and the subsequent recipient, does not impact the rights and obligations of

the registered person regarding self-assessment of OTL and the duty to pay the self-assessed OTL in the manner he wants to discharge by using self-assessed ITC or cash payment.”

Note: It is imperative to note that several amendments and introduction of new sections have been proposed by the Law Committee such as that in Section 16(2), Section 37, Section 38, Section 39, Section 41, Section 42, Section 43 and Section 49 that may majorly impact the process and the nature of claiming of Input Tax Credit moving ahead.

Due to the above mentioned proposals, statutory validity and power shall be provided to the existing use of GSTR-2B statement, restrictions on use of amount in Input Credit Ledger i.e. Rule 86B and by introduction of new provisions, additional conditions and restrictions are proposed to be imposed on the eligibility and the availment of Input Tax Credit.

Therefore, in the times to come, claiming Input Tax Credit shall become a cumbersome process and once such proposals are enacted, the above mentioned pointers for defense against notices of mismatch of Input Tax Credit may not be useful.

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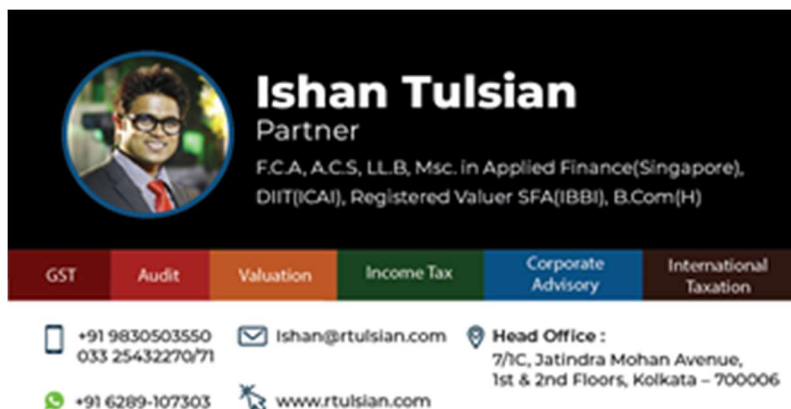
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