Rectification of GSTR-3B – Supreme Court Decision in Bharti Airtel Limited

- Contributed by CA Sri Harsha

The recent judgment of Honourable Supreme Court in the matter of Union of India vs. Bharati Airtel Limited[1] deals with a special circumstance of rectification of Form GSTR-3B. As all of us are aware that Form GSTR-3B is a monthly/quarterly return in which the taxpayer assesses his liability and discharge the same by using the cash and credit. The matter before the Honourable Supreme Court is pertaining to the rectification of such return. Though the rectification of the said return is possible in a different methodology as proposed by Circular 26/26/2017-CT dated 29.12.17 by making changes in a different return, the respondent in the subject matter (Bharati Airtel Limited) wanted to carry such rectification in the same return, where the error has occurred. We shall proceed to examine as to how the matter was finally settled by the Honourable Supreme Court.

The Issue:

Form GSTR-3B is a return to be filed in terms of Section 39 of CT Act[2] read with Rule 61 of CT Rules[3]. This is a periodical return, in which the taxpayer is expected to assess his output tax liability and discharge the same using the balances in electronic cash ledger and electronic credit ledger. Any mistakes committed by the taxpayer while filing and realised after filing the return, the same can be carried in the subsequent returns. Let us say, a taxpayer instead of paying tax on INR 10 Crores has paid tax on INR 15 Crores and declared the later turnover in his monthly GSTR-3B and paid the tax and he realises the error after off-setting the liability while filing the return, then he can reduce his turnover to the extent of INR 5 Crores in the subsequent return and adjust the tax paid earlier to the subsequent month's liability. This is guided by the Circular 26/26/2017- CT dated 29.12.17. However, the taxpayer cannot revise/rectify that month's GSTR-3B and claim refund of tax paid on excess turnover paid that is INR 5 Crores. This is what precisely the writ petitioner (the respondent before the Honourable Supreme Court) tried to do. Accordingly, the issue, before the Honourable Supreme Court is, whether rectification of GSTR-3B is possible in the month in which the error was committed or should be done only in accordance with Circular 26/26/2017-CT?

The History:

Bharati Airtel Limited has filed a writ petition under Article 226 of Constitution before Delhi High Court seeking among other things, that Rule 61, GSTR-3B and Circular 26/26/2017 – CT are ultra-vires the provisions of CT Act to the extent that they do not provide for modification of information in the return of tax period to which such information relates and are arbitrary, in violation of Article 14, Article 19(1)(g), Article 265 and 300A of Constitution of India. The main contention before the Delhi High Court was that the writ petitioner has filed the returns for the period July 17 to September 17 without taking the input tax credit into consideration. The reason for which the input tax credit was not taken into consideration was that the Government has failed to operationalise the Form GSTR-2A, which would indicate the possible input tax credit that was available to the taxpayer. Since, the said Form GSTR-2A was made available only with effective from September 2018, the writ petitioner after seeing the input tax credit available in GSTR-2A, understood that they have paid extra tax amounting to Rs 923 Crores in cash. The writ petitioner stated that if the Form GSTR-2A was made available with effective from July 17 (as promised by Government), he would not have made such excess payment in cash and

[1] 2021 (9) TMI 626 – Supreme Court
[2] Central Goods and Services Tax Act, 2017
[3] Central Goods and Services Tax Rules, 2017

accordingly pleaded the Delhi High Court that the rectification of GSTR-3B for July 17 to September 17 should be allowed and by debiting the electronic credit ledger, it is prayed that the amounts paid in cash should be re-credited to electronic cash ledger.

The Delhi High Court after listening to the writ petitioner and the Union of India has stated that since the said Form GSTR-2A was not made available with effective from July 17, as promised by the Government, the writ petitioner could not be put in a disadvantageous position, since making available the data in GSTR-2A was a right and not merely a facility held that the writ petitioner can rectify the return in respect of which the error occurred and not as suggested by Circular 26/26/2017-CT. Accordingly, the Delhi High Court has directed the Government to look into the matter within two weeks of rectification done by write petitioner and give effect to the same. Aggrieved by this, the Union of India has appealed before the Honourable Supreme Court.

Before Honourable Supreme Court:

Submissions by Union of India:

The Government stated that eligibility and utilisation of credit, is a statutory duty fastened on the taxpayer and he can exercise the same subject to satisfaction of the conditions mentioned. It was stated that though the Form GSTR-2A was not available during the period in dispute, the taxpayer is not in a situation to understand his entitlement to credit, since he has all the access to the books of accounts. The records so maintained by the taxpayer would put him in a position to understand the quantum of credit that was eligible and available to set off against the output tax liability. It was stated that the electronic portal was only an enabler and a facilitator in bringing on board all the registered persons which include the supplier, recipient, registered person and other recipients and efficacy of common electronic portal or malfunctioning thereof, does not extricate the registered person from the primary obligation of self-assessment of output tax liability. It is further stated that Section 37 and Section 38 do not provide for right relating to eligibility of credit. The obligation to do self-assessment of credit and output tax liability and to pay tax by using cash or credit, is a matter of exercising option for electing the mode of discharge of output tax liability and reconciliation predicated under Section 37 and 38, does not impact the rights and obligations of the taxpayer regarding the self-assessment of tax.

The Government concluded stating that any rectification regarding omission or incorrect particulars referred to therein, could be furnished in the month or quarter during which such omission or incorrect particulars came to be noticed and taking any other view would result in ushering inconsistency and uncertainty not only to the concerned registered person, but also to his recipient and supplier and others not directly connected with registered person and hence allowing correction/rectification of Form GSTR-3B of the concerned period is not permissible.

Submissions by Assessees:

The respondent, Bharti Airtel Limited, supported the judgment of Delhi High Court and pleaded that the reading down of Circular 26/26/2017 – CT is to be upheld in so far as it restricts the rectification of Form GSTR-3B in the concerned period. It was stated that it is known to everyone that due to non-operability of the forms, Form GSTR-3B was conceived as a stop gap arrangement and now the Government cannot deny the taxpayers their dues, in particular, right to revise their returns and avail credits. It was argued that the provisions in Circular not permitting the rectification of return is conceptually flawed and not consistent with the legislative intent and provisions of CT Act, since it denies the statutory right of the taxpayer to utilise his credits, due to technical problems in not putting the electronic platform in place. It is also pleaded that by not permitting to avail credit in the electronic credit ledger would result in collection of double tax, an unfair advantage to the Government. It is further stated that Government cannot take advantage of its own failure of not being operationalise Forms

GSTR-2 and GSTR-3 right at the inception when the provisions of the act came into force. Accordingly, it was pleaded that the judgment of Delhi High Court has to be upheld.

Analysis by Supreme Court:

The Supreme Court after dealing with the jurisdictional issues pertaining to writ petition, jumped right on to the precise question, as to, the failure of Delhi High Court to inquire into the cardinal question as to whether Bharati Airtel Limited was required to be fully or wholly dependent on the auto generated information in Form GSTR-2A for discharging its output tax liability for the period in dispute. The Supreme Court stated that the answer to the above question is an emphatic 'No'. The Court stated that the registered person is obliged to adopt the same mechanism as was adopted by them prior to GST laws to discharge the obligation of output tax liability, which was by making reference to the books of accounts, which are very well under the control of taxpayer. The Court stated that the common electronic portal is only a facilitator to feed or retrieve such information and need not be the primary source for doing self-assessment, pointing out the primary source would be the agreements, invoices, challans, receipt of goods, receipt of services and books of accounts, which are very well in the control of taxpayer and not the tax authorities. The court stated this would be sufficient to arrive at the output tax liability and decide the quantum to be paid in cash and credit. The Court stated that factum of non-operability of Form GSTR-2A, is a flimsy plea taken by Bharati Airtel Limited.

Dealing with the question of reading down of Paragraph 4 of the Circular, the Court stated that same would have arisen only if that para is in contradiction to the express provisions of CT Act or rules made thereunder. Section 39(9) has clearly stated that omission or incorrect particulars furnished in GSTR-3B can be corrected in the subsequent months during which the same were noticed and the circular provides a mechanism for doing so and accordingly the Court stated, that the circular cannot be read down.

The Supreme Court has not accepted the view taken by the Delhi High Court in as much as, since there is no possibility of getting refund of excess or surplus credit, the only remedy available to the taxpayer is to utilise the credit by allowing the rectification of Form GSTR-3B. The Supreme Court stated that the view taken by High Court is not logical, since, there was no obligation cast upon by the taxpayer to pay the liability only in cash and failing to chose the payment of tax liability in credit (for no good reason) cannot be a ground for the taxpayer to later on ask for swapping of entries, so as to show the corresponding output tax liability in the electronic cash ledger from which he can take refund. The Supreme Court stated that the taxpayer with full knowledge and information derived from its books of accounts had done self-assessment and assessed the output tax liability for the relevant period and chose to pay the same in cash and having so opted, it is not open to now resile from the legal option already exercised on the feeble reason that GSTR-2A was not operational.

The Supreme Court rejected the plea that the provisions of Section 39(9) cannot be applied to the instant facts for the reason that GSTR-3B is only a stop-gap arrangement and not a return under Section 39 read with Rule 61. The Court stated that thought GSTR-3B is not comparable to GSTR-3, nevertheless, GSTR-3B is prescribed as a 'return' and by subsequent amendment of Rule 61(5), wherein it was clarified that taxpayer need not file GSTR-3. Accordingly, the Court held that efficacy of Form GSTR-3B being a stop gap arrangement for furnishing of return, as was required under Section 39 read with Rule 61, would not stand whittled down in any manner. The Supreme Court also stated that it has not subscribed the view of Gujarat High Court in the matter of AAP & Co, Chartered Accountants vs Union of India[4], wherein it was held that Form GSTR-3B was only a stop-gap arrangement.

[4] 2019-TIOL-1422-HC-AHM-GST

Conclusion:

We do not know the exact reason as to why Bharati Airtel Limited has taken such a plea before Delhi High Court, but when we read the decision of Delhi High Court, we were sure that it was not in accordance with the law, and it is highly possible that the same would be reversed by the Supreme Court. Eventually, it happened and the question that the Supreme Court asked, and Delhi High Court failed is, whether the taxpayer is completely dependent on GSTR-2A for finalisation of the credit available to decide on the mode of discharge of output tax liability. For which the response would be no, since from ages, the availment of credit is based on the self-assessment of taxpayer and asking for re-credit of cash paid to cash ledger since the GSTR-2A was not available was completely out of place. We can understand if the matter is pertaining to the period post October 2019, wherein the restriction of credit is based on the availability in GSTR-2A, but this being the matter prior to October 2019, the plea taken, as in the words of Supreme Court, flimsy. Incidentally, this judgment also brings more clarity on the nature of GSTR-3B, the stop-gap arrangement vs the return, where in the Court concluded that it would definitely be a 'return'.