

MOMENTUS RULING BY DELHI HIGH COURT DECLARING CIRCULAR NO. 26/26/2017-GST dated 29.12.2017 AS ULTRA VIRES

With the passage of time, there is flood of decisions by various High Courts on the technical glitches of the GST portal and the un-preparedness of the IT system for effective operation of the GSTN. The High Courts in the past have allowed filing of TRAN-1 manually and even GSTR-3B to be filed manually in special circumstances which indicates that assesseees cannot be made to suffer on account of flaws in the GST portal. In this update, we wish to discuss yet another crucial decision rendered by the Hon'ble Delhi High Court in the case of **BHARTI AIRTEL LIMITED VERSUS UNION OF INDIA & ORS** pronounced on 05.05.2020 wherein the petitioner was allowed to rectify its GSTR-3B for the month of July, 2017 to September, 2017 instead of rectifying it in subsequent months as contemplated by clarification issued vide **Circular No. 26/26/2017-GST dated 29.12.2017**. It was also held that the clarification given in the said circular is contrary to the provisions contained in CGST Act, 2017 and hence ultra vires.

Briefly stated facts are that the petitioner is engaged in business of providing telecommunication services which was having centralised registration in Service Tax regime. However, with the advent of GST, the petitioner took separate registrations, numbering to 50, in multiple States for compliances under GST Laws. The petitioner stated that during the initial months, i.e. July, 2017 to September, 2017, there were many mistakes, primarily being recording of input tax credit in GSTR-3B on estimate basis without proper validations and checks that were required to be provided by GST portal which led to claiming short input tax credit during the said period and consequently discharge of their output liability in cash. The short claimed input tax credit to the tune of Rs. 923 Crores was unearthed in the month of October, 2018 when the government operationalised the Form GSTR-2A for the past periods. The main reason for non-detection of such discrepancy was attributable to non-operationalization of Forms GSTR-2A, GSTR-2, and GSTR-3 and the system related checks as proposed in the CGST Act, 2017. It was contended that since

there were no checks on Form GSTR-3B which was manually filed, the excess payment of tax went unnoticed. The grievance of the petitioner is that they are not permitted for rectifying their returns for the said period and the clarification requiring them to rectify the mistake in subsequent tax period is inconsistent with the provisions contained in section 39 of the CGST Act, 2017.

The Hon'ble High Court conceded with the contentions of the petitioner and held that the circular prescribing rectification of mistakes in subsequent returns is contrary to the return mechanism contained in section 39 of the CGST Act, 2017. The High Court also affirmed that since the validations and verification checks proposed in CGST Act, 2017 could not be practically implemented due to lack of proper IT infrastructure, the petitioner could not be denied the opportunity of correcting its mistake in reflection of input tax credit, particularly when there is no mechanism to claim refund of tax paid by them in cash. The Hon'ble High Court stated that there is no cogent reasoning behind the logic for restricting the rectification only in the period in which the error is noticed and corrected, and not in the period to which it relates and there is no provision in the Act which directs such restriction in rectification. The High Court held that restriction can be introduced by way of circular only if it is in conformity with the scheme of the Act and provisions contained therein. As the circular is going contrary to the scheme of the Act, the same should not be implemented and reliance was placed on the Apex Court decision given in the case of **COMMISSIONER OF CENTRAL EXCISE, BOLPUR VERSUS RATAN MELTING AND WIRES INDUSTRIES [2008 (13) SCC 1]** wherein it was held that circular which is contrary to the statutory provisions has really no existence in law.

To sum up, it was concluded that when the respondents have failed to fully enforce the scheme of the Act, they cannot take benefit of its own wrong of suspension of the Statutory Forms and deprive the rectification/amendment of the returns to reflect ITC pertaining to a tax period to which the return relates to. Therefore, the Hon'ble High Court allowed the petitioner to rectify GSTR-3B for the period July, 2017 to September, 2017.

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The above decision is an eye opener for the government to re-consider its IT infrastructure as regards filing of returns under GST is concerned. The huge delay in implementing any facility on the GST portal should be recognised as it can be observed that the proposal of e-invoicing and simplified new returns have also not been operationalised and are being regularly deferred. The early realisation to equip its GSTN with the matching concept as proposed in CGST Act, 2017 is essential else it may be detrimental to the revenue of the government.