

# TAX INFO

*Dated 02/11/2021*

Latest update on GST Law: Information regarding **The assessee is obliged to do a self-assessment of its transactions for determination of his tax liability and Form GSTR-2A is only a facilitator, so refund cannot be paid for excess payment of GST in cash instead of availing the ITC as per the facts as given in Judgement by Supreme Court Of India in the case of M/s Bharti Airtel Ltd.**

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<b>Name of Petitioner</b>	Union Of India
<b>Name of Respondent</b>	Bharti Airtel Ltd.
<b>Court</b>	Supreme Court Of India
<b>Date of Judgement</b>	28/10/2021
<b>Appeal No.</b>	Writ Petition No.

## Facts of the Case:

Bharti Airtel Ltd. had been receiving various services from suppliers situated throughout India. It being a supplier of services as well as recipient of services under the GST Act was required to file the details of outward and inward supplies for every month under the GST Act, 2017

During the initial period from July-2017 to September-2017, the company could not avail the entire ITC though otherwise available in the relevant period and had to discharge his output liability by payment through Electronic Cash Ledger to the extent of Rs. 923 crores. As proposed GSTR-2 and GSTR-3 does not become operational and GSTR-3B introduced as Time Gap Arrangement for collection of due taxes but all these returns forms are not linked to each others. Even GSTR-2A became operational in September-2018 though data fetching since July-2017. After introduction of GSTR-2A, the company Bharti Airtel Limited, notices that numerous purchases bill with ITC claim could not be considered in relevant returns (July-2017 to September-2017) and the same could not be claim in the current returns due to delay in claiming of ITC within statutory time period Under these facts, the company filed Writ before the Delhi High Court with a request to allow him to Revised his earlier Returns from July-2017 to September-2017 so as to claim ITC in the relevant returns and once ITC is available in a particular Relevant Return then set off the output tax from ITC and earlier set off from Cash Ledger be transfer to Electronic Cash Ledger from where he can seek Refund of funds available in Cash Ledger to the extent of Rs. 923 Crores. The Delhi High Court allowed the Writ petition stating that **an inbuilt mechanism was guaranteed by the common electronic portal to check the authenticity of data so as to claim ITC for the relevant period against the transactions effected by it with its suppliers. However, during the initial period, after introduction of the common electronic portal, it had several deficiencies and was not geared up to follow the specified regime of auto populated data and in order to calculate the Output Tax Liability and the claim of ITC, during the period from July-2017 to September-2017, there was no formal or official mechanism. Had Form GSTR-2A been functional, there would have been no need to pay the amount in cash, but could have utilized the ITC account (electronic credit ledger) for payment of corresponding Output Tax Liability. The company was unable to correct the mistake in Form GSTR-3B for the relevant periods. FORM GSTR-3B and Circular No.26/2017 dated 29.12.2017 are ultra-vires the provisions of the CGST Act to the extent they do not provide for the modification of information in the return of the tax period to which such information relates and are arbitrary, in violation of Articles 14,19(1)(g), 265 and 300A of Constitution of India.**

The Court also noted **that the company had submitted its monthly Form GSTR-3B based on estimates, for July to September 2017 and every registered person had a right to correct the returns in the very month to which they relate and there was no reason to restrict the mechanism of rectification of the returns.**

**Thereafter, the Union of India file an Appeal before the Hon'ble Supreme Court of India against the order of Hon'ble Delhi High Court.**

## Contention of the Petitioner {Union of India} before the Hon'ble Supreme Court of India:

It is imperative upon a registered person to maintain records regarding transactions between suppliers and the recipients based on their agreements, invoices and books of accounts, either manually or electronically. The records so maintained by the registered person would itself reveal about the eligibility to credit; and its availment is within the exclusive domain of the supplier and the recipient concerned. The registered person under the law is obliged to do a

self-assessment of its transactions and determine the Output Tax Liability and exercise the option to avail of and utilize the ITC to the extent required or to pay the Output Tax Liability by cash at the time of filing of return on the information gathered from the primary record in his possession.

The efficacy of common electronic portal or its malfunctioning thereof, does not extricate the registered person from the primary obligation of self-assessment of Output Tax Liability. Similar obligation was required to be discharged by him even before the GST regime. 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. That rectification regarding omission or incorrect particulars in the return so filed can be effected for the month or quarter during which such omission or incorrect particulars are noticed and not in the concerned return.

### **Decision of the Hon'ble Supre Court of India:**

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. 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 filed by the registered person.

Form GSTR-2A is only a facilitator for taking an informed decision while doing such self-assessment. Non-performance or non-operability of Form GSTR-2A will be of no avail because the registered person is required to submit returns on the basis of such self-assessment in Form GSTR-3B manually or via electronic platform. The registered person is not denied of the opportunity to rectify omission or incorrect particulars, which he could do in the return to be furnished for the month or quarter in which such omission or incorrect particulars are noticed. Thus, it is not a case of denial of availment of ITC as such. The ITC amount remains intact in the electronic credit ledger, which can be availed in the subsequent returns including the next financial year. There is no express provision permitting swapping of entries effected in the electronic cash ledger vis-à-vis the electronic credit ledger or vice versa. The assessee cannot be permitted to unilaterally carry out rectification of his 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. Any indulgence shown contrary to the statutory mandate would not only be an illegality but in reality, would simply lead to chaotic situation and collapse of tax administration. Thus, the rectification can be done only in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed and not in the return for the period to which it relates.

Accordingly, The Delhi High Court order which allowed Bharti Airtel's plea for refund of Rs 923 crore for excess GST paid by it from July to September 2017 was set aside by the Hon'ble Supreme Court of India.

### **Our Comments**

Once, the Hon'ble Supreme Court of India had given the verdicts that GSTR-2A is only a facilitator and the taxpayer is supposed to claim ITC on the basis of his Purchase Tax Invoices and Books of Accounts as per Section 16 of the CGST Act, 2017 then in such a situation, all claims of ITC of taxpayers as per section 16 is a valid claim even if such claims are not appearing in GSTR-2A {which is only a facilitator} and thus crores of notices issued for mismatch of ITC claims in GSTR-3B but not appearing in GSTR-2A are against the true spirit of law and all such notices must be immediately withdrawn by the department without creating any demands on this solely ground of mismatches and where demands are created and matter under litigation, the Jurisdictional Appellate Authority must grant a relief immediately to the taxpayer on the aforesaid verdicts and where demands are created and recovered by the department then the unlawful recovery should be refunded through the process of law atleast for the initial periods wherein taxpayer was permitted to claim ITC as per section 16 of the CGST Act, before introduction of Rule 36(4) under the statutes.

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