L&S UPDATE

An e-update to clients from Lakshmikumaran & Sridharan

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GST UPDATE NO. 15 OF 2020

RECTIFICATION OF PREVIOUSLY FILED FORM GSTR-3B:

Delhi High Court Allows Writ Petition

Lakshmikumaran & Sridharan attorneys

exceeding expectations
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ISSUE

Can Form GSTR-3B filed for a particular month be rectified on subsequent discovery of errors or omissions?

RELEVANT FACTS

Due to the initial hardships in migrating to the GST regime, the Petitioner was not able to accurately compute the amount of Input Tax Credit (**"ITC"**) which it was eligible to avail. Accordingly, the Petitioner populated the eligible ITC in Form GSTR-3B for the months of July 2017 to September 2017 (**"Relevant Period"**) on an estimate basis. Thereafter, when the exact amount of ITC was computed, it was found that the amount of ITC in the Form GSTR-3B for the Relevant Period was under-reported, resulting in an excess payment of output GST liability by way of cash.

Vide Circular No. 26/26/2017-GST, dated December 29, 2017, (**"Impugned Circular"**) the Central Board of Indirect Taxes and Customs (**"CBIC"**) had stated that Form GSTR-3B can be corrected only in the month in which the errors were noticed.

The Petitioner's focal contention against this Circular was that there is no rationale for not allowing rectification in the month in which Form GSTR-3B is filed, and that it is also totally contrary to the statutory scheme of the *Central Goods and Services Tax Act, 2017* (**"CGST Act"**) - which provides that the data filled by a registered person will be validated in that month itself, and thereafter any unmatched details will be rectified in the month in which it is noticed.

Accordingly, the Petitioner filed a Writ Petition before the Delhi High Court challenging the validity of Rule 61(5) of the CGST Rules (which is the enabling provision for Form GSTR-3B), Form GSTR-3B and Impugnes Circular as being *ultra vires* the provisions of CGST Act and also being arbitrary and violative of Articles 14, 19(1)(g) and 300A of the Constitution of India.

ARGUMENTS ON BEHALF OF THE PETITIONER

Though initially the provisions of Rule 61(5), Form GSTR-3B and the Impugned Circular were challenged, the arguments put forth were restricted to only challenging the validity of the impugned Circular. The arguments are stated in brief:

- The initial scheme of filing returns under GST provided for in-built checks and balances. Form GSTR-3B is a summary return without any such in-built checks and balances and was introduced only because Forms GSTR-2 and GSTR-3 could not be made operational.

- This summary scheme in place of the originally contemplated scheme has stifled the rights of the Petitioner by not permitting the validation of the data prior to the details being uploaded.

- Delay in operationalising Form GSTR-2A cannot defeat the rights of the Petitioner to take and use credit in the month in which it was due.

- Reliance was placed on the decision of Gujarat High Court in *AAP & Company Chartered Accountants* v. *Union of India* (2019-VIL-314-GUJ), wherein it was held that GSTR-3B was not a return under Section 39 and was only a temporary facility, and that delay in claiming credit cannot delay the period for which it is claimed.

- Further, reliance was also placed on various decisions wherein it was observed that GST is still in a "trial and error" phase and accordingly permitted assessees to rectify / revise the returns.

- The revision of Form GSTR-3B is revenue neutral since the Government has realised the tax leviable under law. The eligibility of the Petitioner to the ITC can also be verified by the Department prior to rectification.

ARGUMENTS ON BEHALF OF THE DEPARTMENT

- The rationale for the restriction in not allowing the changes in Form GSTR-3B for the Relevant Period can be understood from Section 39(9) of the CGST Act, according to which any omission or incorrect particulars discovered after filing the return shall be rectified in the return for the period during which such omission or incorrect particulars is noticed.

- The Impugned Circular is aligned with the provisions of the Act, wherein the changes would be possible only in the return pertaining to the period in which the error is noticed.

- Allowing changes in the return for the original tax period would result in unnecessary complexities wherein it may require corresponding changes to be made in the return filed by the supplier or the recipient, as the case may be.

ANALYSIS AND OBSERVATIONS BY THE DELHI HIGH COURT

- Para 4 of the Impugned Circular is not in consonance with the provisions of the CGST Act where first stage validation is allowed prior to filing the return. Therefore, there is neither any provision under the Act which would restrict the rectification in the relevant month nor any cogent reasoning to support the same.

- The provisions of the CGST Act provided for a self-policing system by way of Forms GSTR-1, GSTR-2 and GSTR-3, whereby the authenticity of information submitted in the returns is verified by the supplier and confirmed by the recipient in the same month. The Department has failed to fully enforce the scheme of the CGST Act and 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.

- Since the Department could not operationalise the statutory forms envisaged under the CGST Act, resulting in depriving the Petitioner to accurately reconcile its ITC, the Department cannot now deprive the Petitioner of the benefits that would have accrued in favour of the

Petitioner, if such forms would have been enforced.

- It is a trite proposition of law that a circular issued by the Board cannot be contrary to the CGST Act and the Government cannot impose conditions which go against the scheme of the statutory provisions contained in the CGST Act.

- The subordinate legislation must conform to the statute under which it is made, and it cannot whittle down the benefits granted under statutory provision.

- Petitioner has a substantive right to rectify/adjust the ITC for the period to which it relates.

RATIO DECIDENDI

It was thus held that the rectification of Form GSTR-3B for that very month to which it relates is imperative and, accordingly, para 4 of the Impugned Circular was read down to the extent that it restricts the rectification of Form GSTR-3B in respect of the period in which the error or omission has occurred.

The Writ Petition was allowed, and permission was granted to the Petitioner to rectify Form GSTR-3B for the period to which the error relates, i.e. the Relevant Period from July 2017 to September 2017.

IMPLICATIONS AND COMMENTS

- This decision provides a welcome relief to assessees who were not allowed to correct the errors and omissions made in the previously filed Form GSTR-3B.

- In cases with similar facts as in the case of the Petitioner, the assessees may contend that, on rectification, since higher amount of ITC would be available to utilise against the Output GST liability, the excess liability discharged in cash is refundable under Section 49(6) of the CGST Act.

- This decision may also be useful to fight demands raised by the department denying credit on grounds of mismatch.

[*Bharti Airtel Ltd.* v. *Union of India and Others* – Judgement dated May 5, 2020 in W.P.(C) 6345/2018, CM APPL. 45505/2019, Delhi High Court]

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