L&S UPDATE

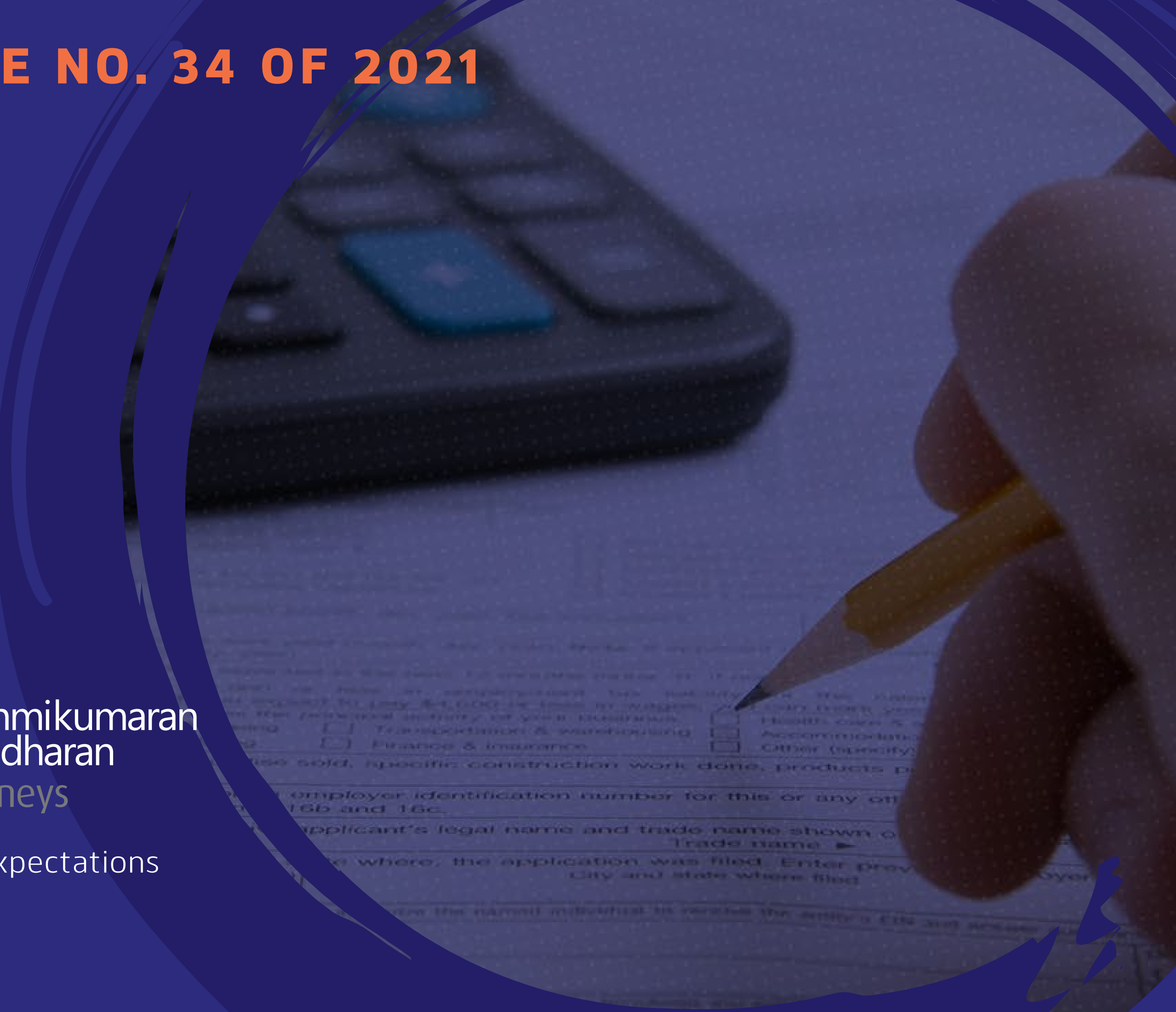
An e-update to clients from Lakshmikumaran & Sridharan

29 OCTOBER 2021

INDIRECT TAX

Rectification of Form GSTR-3B – Supreme Court upholds para 4 of CBIC Circular No. 26/26/2017-GST

UPDATE NO. 34 OF 2021



Lakshmikumaran & Sridharan attorneys

exceeding expectations

SINCE 1985

The Supreme Court of India has allowed Revenue department's appeal against the Delhi High Court decision where the High Court had allowed rectification of Form GSTR-3B in respect of the period in which the error had occurred. The Apex Court was of the view that Paragraph 4 of the Circular dated 29 December 2017, restricting such rectification, is consistent with the statutory provisions.

BRIEF FACTS

- The present Civil Appeal was filed by the Appellant-department challenging the Judgment dated 5 May 2020 of the Delhi High Court.

- According to the Respondent-assessee, during the initial phase of GST implementation, due to various technical issues, it did not have the correct details of Input Tax Credit (**'ITC'**) and therefore, it filed monthly returns in Form GSTR-3B by recording ITC on estimate basis. As the details of ITC were not known to the assessee, it discharged its output tax liability in cash.

- Subsequently, when the correct details were made available, the assessee realized that the ITC figures were under-reported, and the tax liability was incorrectly discharged through cash.

- As per the assessee, the said error occurred due to delay in operationalization of Form GSTR-2, 2A and 3.

- Thus, the assessee wanted to rectify its earlier returns (i.e. Form GSTR-3B), however, it was unable to do so in view of the paragraph 4 of the Circular No. 26/26/2017-GST dated 29 December 2017 which restricted the rectification of such Form GSTR-3B.

- *Vide* its judgement dated 5 May 2020, the Delhi High Court allowed the Writ Petition by reading down paragraph 4 of the said Circular to the extent it restricted the rectification of Form GSTR-3B in respect of the period in which the error had occurred.

- The High Court further allowed the assessee to rectify Form GSTR-3B filed for the period July 2017 to September 2017.

ISSUE

Whether the High Court was correct in reading down paragraph 4 of the Circular dated 29 December 2017?

SUPREME COURT'S DECISION

- Assessee being a registered person is under a legal obligation to maintain books of accounts and records as per the provisions of the Central Goods and Services Tax Act, 2017 (**'CGST Act'**) and the Rules. Thus, it is not wholly dependent on the auto-generated information for discharging its tax obligation.

- Even in the past, it had been maintaining such books of accounts and was submitting returns on its own. It is the same pattern which had to be followed in post-GST regime.

- Thus, non-operability of Form GSTR-2 has no impact on the determination of tax liability by the assessee which could have been determined through the records maintained by it.

- Form GSTR-3B, though a stop gap arrangement, is a return under the GST and the provisions of Section 39(9) of the CGST Act and Rule 61 would apply in full vigor to the returns filed in FORM GSTR-3B.

- Payment of liability through cash or credit is a matter of option. Once the option is exercised by an assessee, it cannot be reversed as there is no express provision in the CGST Act and / or the CGST Rules which permit swapping of entries effected in the electronic cash ledger vis-à-vis the electronic credit ledger or *vice-versa.*

- If the assessee is allowed to rectify returns, it would result in complete chaos and uncertainty and collapse of tax administration. Thus, it cannot be allowed to unilaterally rectify the returns which would affect the liabilities of other stakeholders.

- Paragraph 4 of the Circular dated 29 December 2017 is consistent with the statutory provisions and the High Court erred in allowing rectification of returns in the teeth of the statutory provisions.

- The finding of the High Court that as there was no possibility of getting refund of the excess ITC, the only remedy for seamless utilization of credit was by allowing rectification of Form GSTR-3B, is also incorrect. The ITC amount remains intact in the credit ledger which can be availed in the subsequent returns including the next financial year.

- Consequently, the appeal filed by the Department was allowed and the judgment passed by the High Court of Delhi was set aside.

L&S Comments:

While applicability of the decision must be seen in the facts of each case. It is now clear that Form GSTR-3B is a return for the purposes of GST laws. Thus, it can only be rectified in the manner specified in Section 39(9) read with Rule 61(5). 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.

[*Union of India* v. *Bharti Airtel Ltd.* – Judgement dated 28 October 2021 in Civil Appeal No. 6520/2021, Supreme Court]

LOCATIONS

NEW DELHI

5 Link Road, Jangpura Extension,
New Delhi 110 014
PHONE: 011-4129 9800

B-6/10, Safdarjung Enclave,
New Delhi 110 029
PHONE: 011-4129 9900
E-MAIL: Lsdel@lakshmisri.com

MUMBAI

2nd Floor, CNERGY IT Park,
Old Standard Mill,
Appa Saheb Marathe Marg,
Prabhadevi,
Mumbai 400 025
PHONE: 022-2439 2500
E-MAIL: Lsbom@lakshmisri.com

CHENNAI

2, Wallace Garden, 2nd Street,
Chennai 600 006
PHONE: 044-2833 4700
E-MAIL: Lsmds@lakshmisri.com

BENGALURU

World Trade Center,
No. 404-406, 4th Floor, South Wing,
Brigade Gateway Campus,
No. 26/1 Dr. Rajkumar Road,
Malleswaram West,
Bengaluru 560 055
PHONE: 080-4933 1800
E-MAIL: Lsblr@lakshmisri.com

HYDERABAD

'Hastigiri', 5-9-163, Chapel Road,
Opp. Methodist Church, Nampally,
Hyderabad 500 001
PHONE: 040-2323 4924
E-MAIL: Lshyd@lakshmisri.com

AHMEDABAD

B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad 380 009
PHONE: 079-4001 4500
E-MAIL: Lsahd@lakshmisri.com

PUNE

607-609, Nucleus,
1 Church Road, Camp
Pune 411 001
PHONE: 020-6680 1900
E-MAIL: Lspune@lakshmisri.com

KOLKATA

2nd Floor, Kanak Building,
41, Chowringhee Road,
Kolkata 700 071
PHONE: 033-4005 5570
E-MAIL: Lskolkata@lakshmisri.com

CHANDIGARH

SCO No. 59, 1st Floor,
Sector 26, Madhya Marg,
Chandigarh 160 026.
PHONE: 0172-492 1700
E-MAIL: Lschd@lakshmisri.com

GURUGRAM

OS2 & OS3, 5th Floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurugram 122 001
PHONE: 0124-477 1300
E-MAIL: Lsgurgaon@lakshmisri.com

PRAYAGRAJ (ALLAHABAD)

3/1A/3, (Opp. Auto Sales)
Colvin Road, Lohia Marg,
Prayagraj 211 001
PHONE: 0532-242 1037/242 0359
E-MAIL: Lsallahabad@lakshmisri.com

KOCHI

1st Floor, PDR Bhavan,
Palliyil Lane, Foreshore Road,
Ernakulam, Kochi 682016
PHONE: 0484-486 9018/486 7852
E-MAIL: Lskochi@lakshmisri.com

JAIPUR

2nd Floor (Front side),
Unique Destination, Tonk Road,
Near Laxmi Mandir Cinema Crossing,
Jaipur, Rajasthan 302 015
PHONE: 0141-456 1200
E-MAIL: Lsjaipur@lakshmisri.com

NAGPUR

1st Floor, HRM Design Space,
90-A, Next to Ram Mandir,
Ramnagar, Nagpur 440033
PHONE: +91-712-2959038/2959048
E-MAIL: Lsnagpur@lakshmisri.com

www.lakshmisri.com

Lakshmikumaran & Sridharan attorneys

exceeding expectations
SINCE 1985