REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2021
(ARISING OUT OF S.L.P. (C) NO. 8654 OF 2020)

UNION OF INDIA **APPELLANT(S)**

VERSUS

BHARTI AIRTEL LTD. & ORS. **RESPONDENT(S)**

J U D G M E N T

A.M. KHANWILKAR, J.

1. This appeal emanates from the judgment and order dated 05.05.2020 passed by the High Court of Delhi in W.P. (C) No.6345 of 2018, whereby the High Court allowed the writ petition filed by respondent No.1 herein and read down paragraph 4 of the Circular No. 26/26/2017-GST dated 29.12.2017[1] issued by the Commissioner (GST), Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, GST Policy Wing[2], 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 also allowed respondent No.1 to rectify

1 for short, "impugned Circular"
2 for short, "Commissioner (GST)"

Form GSTR-3B for the period in which error had occurred, i.e., from July to September 2017. Further, the High Court directed the appellant that on filing of the rectified Form GSTR-3B, they shall, within a period of two weeks, verify the claim set forth by respondent No.1 and give effect to the same once verified.

2. This *lis* is aftermath of enacting the Central Goods and Services Tax Act, 2017[3], which came into force with effect from 01.07.2017. Vide Notification No.10/2017 dated 01.07.2017, Rules 59, 60 and 61 of the Central Goods and Services Tax Rules, 2017[4] were brought into force along with Forms GSTR-1, GSTR-2, GSTR-2A, GSTR-3 and GSTR-3B.

3. In the context of the matter in issue, it may be apposite to take note of the Notification No.17/2017-Central Tax dated 27.07.2017 issued for amending Rule 61 by altering the wording of Rule 61(5) and introducing Rule 61(6). Rule 61(5), as it stood earlier when it came into force, read thus:

> "(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, return in FORM GSTR-3B, in lieu of FORM GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner"

3 for short, "2017 Act"
4 for short, "2017 Rules"

4. This provision was not only substituted, but sub-Rule (6) was also inserted in Rule 61 by the said amendment vide Notification No.17/2017-Central Tax. The amended provision reads thus:

"Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

Notification No. 17/2017 – Central Tax

New Delhi, the 27th July, 2017

G.S.R. ( )E.:- In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:-
(1) .....
.....
2. In the Central Goods and Services Tax Rules, 2017,
.....
(v) in rule 61, with effect from 1st July, 2017, for sub-rule (5), the following sub-rules shall be substituted, namely:-

"(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 and in FORM GSTR-2 under section 38 has been extended and the circumstances so warrant, the Commissioner may, by notification, specify that return shall be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner.

(6) Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2—

(a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return

> shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period;
>
> (b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR-3 and discharge his tax and other liabilities, if any;
>
> (c) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person.";
>
> ....."

5. This was followed by Notification No.18/2017-Central Tax dated 08.08.2017, whereby time to file Form GSTR-1 for the months of July and August 2017 was extended to 05.09.2017 and 20.09.2017 respectively. On the same day, in exercise of the powers conferred by Rule 61(5) of the stated Rules, the Central Government issued Notification No.21/2017-Central Tax specifying that the return for the months of July and August 2017 shall be furnished in Form GSTR-3B electronically through the common portal before the dates as specified in the corresponding entry in column (3) of the table given therein. To wit, the date for filing of Form GSTR-3B for the month of July 2017 was notified as 20.08.2017 and that for the month of August 2017 was notified as 20.09.2017.

6. The Under Secretary to the Government of India issued another Notification bearing No.23/2017-Central Tax dated 17.08.2017 to extend the time for filing Form GSTR-3B for the month of July 2017 for persons opting to file Form GST TRAN-1 on or before 20.08.2017 till 28.08.2017, subject to fulfilment of certain conditions like depositing of tax payable under the Act and payment of interest, if any. Respondent No.1 filed its return in Form GSTR-3B for the month of July 2017 on 31.08.2017.

7. The Commissioner (GST) issued another Circular No.7/7/2017-GST dated 01.09.2017 relating to system-based reconciliation of information furnished in Forms GSTR-1, GSTR-2 and GSTR-3B and the mechanism for correction of erroneous details furnished in Form GSTR-3B.

8. On the representations received from the business community, the Under Secretary to the Government of India issued Notification No.35/2017-Central Tax dated 15.09.2017 in exercise of the powers conferred by Section 168 of the 2017 Act read with Rule 61(5) of the 2017 Rules and other enabling provisions, on the recommendations of the Goods and Services Tax Council[5], specifying the dates for filing of return for the

5 for short, "the Council"

concerned month as per the table given therein, in Form GSTR-3B electronically, through the common portal on or before the last date specified in the corresponding entry in column (3) of the said table. The last date for the concerned English calendar month was specified as 20th day of the succeeding English calendar month for the period between August and December 2017. Respondent No.1 filed its return in Form GSTR-3B on 20.09.2017 for the month of August 2017 and on 16.10.2017 for the month of September 2017.

9. The Under Secretary to the Government once again issued Notification No.56/2017-Central Tax dated 15.11.2017, specifying the timeline for filing of return in Form GSTR-3B for the month of January, February and March 2018 as 20th February, 20th March and 20th April, 2018 respectively.

10. The Commissioner (GST) then issued the impugned Circular on the subject of filing of returns under GST, clarifying certain issues considered by the Central Board of Indirect Taxes and Customs[6] to usher in uniformity in implementation across field formations. By this Circular, the earlier Circular issued on 01.09.2017 was kept in abeyance until the system-based

6 for short, "the Board"

reconciliation prescribed under that Circular was to be operationalized consequent to issue of relevant notification. Sub-paragraphs 3.1 and 3.2 of paragraph 3 of this Circular dealing with amendment/corrections/rectification of errors, provided as follows;

> "**3. <u>Amendment / corrections / rectification of errors</u>:**
> 3.1 Various representations have been received wherein registered persons have requested for clarification on the procedure for rectification of errors made while filing their FORM GSTR-3B. In this regard, Circular No. 7/7/2017-GST dated 1st September 2017 was issued which clarified that errors committed while filing FORM GSTR – 3B may be rectified while filing FORM GSTR-1 and FORM GSTR-2 of the same month. Further, in the said circular, it was clarified that the system will automatically reconcile the data submitted in FORM GSTR-3B with FORM GSTR-1 and FORM GSTR-2, and the variations if any will either be offset against output tax liability or added to the output tax liability of the subsequent months of the registered person.
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> 3.2 Since, the GST Council has decided that the time period of filing of FORM GSTR-2 and FORM GSTR -3 for the month of July 2017 to March 2018 would be worked out by a Committee of officers, the system based reconciliation prescribed under Circular No. 7/7/2017-GST dated 1st September 2017 can only be operationalized after the relevant notification is issued. **The said circular is therefore kept in abeyance till such time**."
>
> (emphasis supplied)

11. It may be useful to advert to paragraph 4 of the same Circular, which reads thus:

> "4. It is clarified that as return in FORM GSTR-3B do not contain provisions for reporting of differential figures for past month(s), the said figures may be reported on net basis alongwith the values for current month itself in appropriate tables i.e. Table No. 3.1,

> 3.2, 4 and 5, as the case may be. It may be noted that while making adjustment in the output tax liability[7] or input tax credit[8], there can be no negative entries in the FORM GSTR-3B. **The amount remaining for adjustment, if any, may be adjusted in the return(s) in FORM GSTR-3B of subsequent month(s) and, in cases where such adjustment is not feasible, refund may be claimed**. Where adjustments have been made in FORM GSTR-3B of multiple months, corresponding adjustments in FORM GSTR-1 should also preferably be made in the corresponding months."
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> (emphasis supplied)

12. Respondent No. 1 was, however, keen on availing of the dispensation specified in the Circular dated 01.09.2017 for the relevant period (July to September 2017), having realized that there was surplus amount of ITC in its ledger account (electronic credit ledger). It is the case of respondent No.1 that it had been receiving various services from suppliers situated throughout India including Delhi. It being a supplier of services as well as recipient of services under the 2017 Act, was required to file the details of outward and inward supplies for every tax period and also of monthly return under the GST Act. In order to calculate the OTL and the claim of ITC, during the period from July till September 2017, there was no formal or official mechanism to check the authenticity of data so as to claim ITC for the relevant period against the transactions effected by it with its suppliers.

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7 For short, "OTL"
8 For short, "ITC"

Whereas, an inbuilt mechanism was guaranteed by the common electronic portal to be put in place by the Competent Authority under the 2017 Act. 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 - as predicated in Sections 37 and 38 of the 2017 Act.

13. Form GSTR-1 for the relevant months of July to September 2017 was required to be filed before 10.01.2018 vide Notification No.72/2017-Central Tax dated 29.12.2017. Significantly, Form GSTR-2A became operational only in September 2018. For that reason, as a stop gap arrangement, the registered persons were required to submit returns in Form GSTR-3B. It is only after Form GSTR-2A became operational in September 2018, it is stated that respondent No. 1 realized that it had sufficient amount in the ITC ledger account (electronic credit ledger) during the relevant period. Further, due to non-functionality of GSTR-2A, respondent No. 1 had to discharge its OTL by depositing/paying in cash. Had Form GSTR-2A been functional, there would have been no need for respondent No. 1 to pay the amount in cash, but could have utilized the ITC account (electronic credit ledger) for payment of

corresponding OTL. For that reason, respondent No.1 would urge that if it was allowed to rectify Form GSTR-3B, so as to avail ITC for the relevant period in terms of Circular dated 01.09.2017, the amount paid by it in cash towards the OTL would get credited to its electronic cash ledger account. However, the impugned Circular dated 29.12.2017 comes in the way of respondent No. 1 in doing so. Resultantly, respondent No.1 approached the High Court by way of writ petition under Article 226 of the Constitution of India, filed on 31.05.2018, praying for the following reliefs:

> **"PRAYER**
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> "In light of the facts and circumstances mentioned above and in consideration of grounds taken above, the Petitioner most humbly prays that this Hon'ble Court may be pleased to:
>
> (a) issue an appropriate writ, order or direction in nature of declaration that Rule 61(5), 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.
>
> (b) issue an appropriate writ, order or directions declaring the Notifications No.23/2017-Central Tax dated 17.08.2017, 35/2017-Central Tax dated 15.09.2017 and 56/2017-Central Tax dated 15.11.2017, the same as *ultra vires* the provisions of Section 39(7) of the CGST Act to the extent it provides for payment of tax finally under the CGST Act by the date mentioned for filing FORM GSTR-3B;
>
> (c) issue an appropriate writ, order or direction in nature of certiorari or any other writ, order or direction of like nature, to call for, examine the records in relation to Circular No.26/2017 dated 29.12.2017 and

quash the same to the extent it does not provide for the modification of the information in the return of the tax period to which such information relates as being arbitrary, in violation of Articles 14, 19(1)(g), 265 and 300A of Constitution of India.

(d) issue an appropriate writ, order or direction declaring the tax liability of the Petitioner filed under FORM GSTR-3B is provisional and the output tax liability of the Petitioner will only crystalize after the filing of FORM GSTR-1, 2 and 3.

(e) issue an appropriate writ, order or directions in the nature of mandamus or any other writ, directing the Respondents to operationalize/start the facility of FORM GSTR-2 and FORM GSTR-3 for period commencing from 01.07.2017;

(f) issue an appropriate writ, order or directions in the nature of mandamus or any other writ, directing the Respondents to provide the Petitioner the facility for amendment and modification of FORM GSTR-3B and grant such consequential relief as may be necessary;

(g) Pass any orders as this Hon'ble Court may deem fit in the given facts and circumstances of the present case;"

14. During the pendency of the writ petition, Forms GSTR-2, GSTR-2A and GSTR-3 came to be operationalized w.e.f. September 2018. The Central Government then issued Notification No.49/2019-Central Tax dated 09.10.2019, thereby omitting Rule 61(6) w.e.f. 01.07.2017 and substituting Rule 61(5) from the same date to read as follows:

"Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Indirect Taxes and Customs

Notification No. 49/2019 – Central Tax

New Delhi, the 9th October, 2019

G.S.R.....(E). - In exercise of the powers conferred by section 164 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government hereby makes the following rules further to amend the Central Goods and Services Tax Rules, 2017, namely:
(1) .....

(4) In the said rules, in rule 61,-
(a) for sub-rule (5), the following sub-rule shall be substituted, with effect from the 1st July, 2017 namely:-

"(5) Where the time limit for furnishing of details in FORM GSTR-1 under section 37 or in FORM GSTR-2 under section 38 has been extended, the return specified in sub-section (1) of section 39 shall, in such manner and subject to such conditions as the Commissioner may, by notification, specify, be furnished in FORM GSTR-3B electronically through the common portal, either directly or through a Facilitation Centre notified by the Commissioner:

Provided that where a return in FORM GSTR-3B is required to be furnished by a person referred to in sub-rule (1) then such person shall not be required to furnish the return in FORM GSTR-3;
....."

(emphasis supplied)

We have adverted to this Notification whilst noting that validity thereof has not been challenged, though it has come into effect from 01.07.2017 and governs the period between July and September 2017, which is subject matter of this proceedings.

15. Notably, the High Court did not set aside the impugned Circular dated 29.12.2017, but preferred to read down only paragraph 4 thereof to the extent it restricted the rectification of Form GSTR-3B in respect of period in which the error had

occurred. For, the High Court was of the view that the stated restriction was contrary to the provisions of the 2017 Act and the Rules framed thereunder.

16. The High Court in its judgment took note of the repeated technical glitches in the electronic common portal introduced by the Department, during the transition phase from the erstwhile regime to the GST regime. The High Court then noted that respondent No.1 had submitted its monthly Form GSTR-3B based on estimates, for the relevant period of July to September 2017. Further, the exact ITC in the electronic credit ledger for the relevant period could be known to respondent No. 1 a month later in October 2018, when GSTR-2A became operational. Only thereafter, respondent No. 1 realized that there had been an excess payment of Rs.923 crores in cash for discharging OTL. In other words, despite the fact that a bona fide error had occurred for reasons beyond the control of respondent No. 1, yet respondent No. 1 was unable to correct the mistake in Form GSTR-3B for the relevant period. The High Court held that CGST contemplated a self-policing system. Resultantly, the statutory provisions had provided for generation of auto-populated data of the stakeholders. That was a right and not a mere facility made available to

registered persons. Thus, every registered person had a right to correct the returns in the very month to which they relate and not visited with any adverse consequences for uploading incorrect data. The High Court noted the admission of the Department that the operation of Forms GSTR-2 and GSTR-3 could not be effected due to technical issues at their end necessitating postponement for indefinite period. In other words, the Department itself was not fully geared up to handle such an elaborate electronic procedure. The High Court further noted as to how due to non-functioning of Forms GSTR-2 and GSTR-3, Rule 61(5) and 61(6) was required to be inserted in the 2017 Rules and provide for monthly return in Form GSTR-3B, which was a summary return. The High Court also accepted the contention of respondent No. 1 that it had to discharge the OTL for the relevant period in cash, even though it had ITC available to its credit in electronic credit ledger, due to the fault of the Department in not operationalizing the statutorily prescribed Forms GSTR-2, GSTR-2A and GSTR-3. That had resulted in excess payment of cash by respondent No.1. The High Court also took note of the refund provisions to observe that even if there was a possibility to adjust the accumulated ITC in future, it could not be a ground to deprive respondent No.1 of

its option to fully utilize the ITC which it was statutorily entitled to. The High Court held that there was no reason to restrict the mechanism of rectification to the returns of subsequent months. It also held that paragraph 4 of the impugned Circular dated 29.12.2017 was not in consonance with the provisions of the 2017 Act.

17. Accordingly, the High Court allowed the writ petition and permitted respondent No.1 to rectify Form GSTR-3B for the period to which the 'error relates' i.e., the months of July to September 2017. The operative directions issued by the High Court read thus:

> "24. Thus, in light of the above discussion, the rectification of the return for that very month to which it relates is imperative and, accordingly, we read down para 4 of the impugned Circular No. 26/26/2017-GST dated 29.12.2017 to the extent that it restricts the rectification of Form GSTR-3B in respect of the period in which the error has occurred. Accordingly, we allow the present petition and permit 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. We also direct the Respondents that on filing of the rectified Form GSTR-3B, they shall, within a period of two weeks, verify the claim made therein and give effect to the same once verified. In view of the fact that the final relief sought by the Petitioner has been granted and the petition is allowed, no separate order is required to be passed in the application seeking interim relief. Accordingly, the said application is disposed of as such."

18. The appellant has assailed the view so taken by the High Court. At the outset, it was urged that the High Court had no

territorial jurisdiction to entertain the writ petition filed by respondent No.1. This objection is founded on the argument that the source of power to levy and collect GST under the 2017 Act vests both in the State and the Centre. The Delhi High Court could not have decided the issues concerning other State(s) and that too without making them as party respondent. The writ petitioner has chosen to only implead the Council which is a body created only to decide about the policy and is not a tax collector as such. Thus, besides the High Court had no territorial jurisdiction, the writ petition suffered from the *vice* of non-joinder of necessary parties.

19. As regards the merits, the appellant has invited our attention to the constitutional background and the erstwhile regimes of the central excise law, service tax law etc., and in contrast, the dispensation provided in the GST regime and the obligation of every outward supplier to pay OTL. It is urged that the GST is a beginning of a new era of cooperative federalism and the purport of Article 246A read with Article 279A of the Constitution fortify that position. It is a regime to bring about paradigm shift in the erstwhile taxes such as excise duty, service tax, entry tax, VAT and other additional and minor levies based on multiple taxable

events, which have been subsumed into one taxable event called "supply of goods and services". The new dispensation enables both the Union of India and the respective States to become joint federal partner in taxing goods and services simultaneously and have equal rates on the occurrence of the taxable event. Notably, the 2017 Act is not ascribable to any Entry in List I, List II or for that matter, List III. It is a *sui generis* regime in the Constitution by virtue of Article 246A read with Article 279A and the field of taxation thereunder is goods and services and the power to tax is simultaneous and coextensive.

20. Shri N. Venkataraman, learned Additional Solicitor General of India, took us through the provisions of the 2017 Act regarding payment of duties/taxes and availing of ITC including the eligibility and utilization of ITC. As regards the eligibility and utilization of ITC, there is a statutory duty fastened on every registered person governed under various regimes and presently under the GST law, to pay OTL and a corresponding right to avail and utilize ITC, subject to eligibility and conditions specified therefor. The right to claim ITC, being a statutory right, is circumscribed by conditions and restrictions, subject to which a registered person is entitled to take credit. The provisions

regarding entitlement of ITC enable a registered person to utilize the same for discharging the OTL. 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 OTL and exercise the option to avail of and utilize the ITC to the extent required or to pay the OTL by cash. The Authorities have no role to play whatsoever in that regard. It is an option to be exercised by the registered person and not by the Authorities. This principle has remained the same both before the GST and also post GST regime. Indeed, the registered person has been provided with a common electronic portal or tax electronic portal, which is only an enabler and a facilitator in bringing on board all the registered persons which include the supplier, recipient, registered person and other recipients. The efficacy of common electronic portal or so to say malfunctioning thereof, does not extricate the registered person

from the primary obligation of self-assessment of OTL as predicated in Section 16 of the 2017 Act. For doing so, the registered person is obliged to maintain accounts and records as envisaged under Chapter VII of the 2017 Rules. That ought to be the basis for self-assessment of OTL in the first place. On the basis of the facts and figures emanating from such records, the registered person can collate the relevant information regarding entitlement to avail ITC collected from supplier of goods or services or for both which are used or intended to be used in the course of furtherance of his business. Suffice it to observe that the registered person is expected to exercise the option of utilizing ITC or to pay by cash for discharging his OTL at the time of filing of return on the information gathered from the primary record in his possession.

21. The eligibility and availment of ITC is indeed subject to conditions and restrictions in the manner specified in Section 49 of the 2017 Act. If the registered person intends to avail ITC, he can do so by paying the OTL from his electronic credit ledger referred to in Sections 2(46) and 49(2) of the 2017 Act. He can avail of ITC on the conditions specified in Section 16(2) read with Sections 41 and 49(2) of the 2017 Act. As per Section 59 of the

2017 Act, every registered person is required to self-assess the taxes payable under the 2017 Act and furnish a return for each tax period as specified under Section 39 of the 2017 Act.

22. It is urged that the scheme of the 2017 Act makes it amply clear that the obligation in the matter of deciding about the eligibility and mode of payment of OTL including self-assessment, is to be exercised by the registered person himself and the Authorities have no role to play at that stage. The registered person cannot find fault with the deficiencies in the common electronic portal so as to extricate from this obligation. Similar obligation was required to be discharged by him even before the GST regime came into being vide the 2017 Act with effect from 01.07.2017. 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. The features provided in the context of Sections 42 and 43 of the 2017 Act relating to ITC and OTL, are dynamic and seamless processes of matching of invoices of the supplier and the recipient. The invoice matching mechanism contemplated under Sections 42 and 43, was expected to be accomplished by the introduction of a set of

forms, namely, GSTR-1, GSTR-1A, GSTR-2, GSTR-2A and GSTR-3. As per the mechanism predicated in the 2017 Act, the entire exchange processes were intended to happen between 11th and 17th of every following month and once the reconciliation gets over, every registered person had to file a monthly return in Form GSTR-3 by 20th of the following month and discharge his OTL. As aforesaid, to overcome the initial problems faced after introduction of the common electronic portal and the non-operability of the concerned forms, it was decided to make a stop gap arrangement enabling the registered person to file his return electronically in Form GSTR-3B, which contains necessary information relevant for completing the self-assessment process and payment of OTL, if any. Though a stop gap arrangement, it was always treated as return within the meaning of Section 39 of the 2017 Act. 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. Taking any other view would result in ushering in inconsistency and uncertainty not only to the concerned registered person, but also to his recipient and supplier and other records not directly connected with the registered person. Hence, allowing

correction/rectification of Form GSTR-3B of the concerned period is not permissible in the new dispensation; and for which reason, an express provision had been made in Section 39(9)[9] 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. The corrections permitted in Forms GSTR-1 and GSTR-2 are of different nature, whereas the return filed in Form GSTR-3B for the relevant period ought to remain as it is.

23. It is further urged that Sections 37 and 38 of the 2017 Act do not provide for right relating to eligibility of ITC. The obligation to do self-assessment of ITC and of OTL and to pay the self-assessed OTL by using the ITC or by cash payment, is a matter of exercising

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9 **39. Furnishing of returns.-**

(1) to (8) .....

(9) Subject to the provisions of sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) **discovers any omission or incorrect particulars therein**, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, **he shall rectify such omission or incorrect particulars in the return to be furnished for the month or quarter during which such omission or incorrect particulars are noticed**, subject to payment of interest under this Act:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier.

(emphasis supplied)

option for electing the mode of discharge of OTL. Further, reconciliation predicated under Sections 37 and 38 between the outward supplier, registered person and the subsequent recipient, does not impact the rights and obligations of the registered person regarding self-assessment of OTL and the duty to pay the self-assessed OTL in the manner he wants to discharge by using self-assessed ITC or cash payment.

24. It is urged that the option so exercised by the registered person is his own volition and the Authorities have no concern or any role to play at that stage. The High Court has completely glossed over this crucial aspect and proceeded to answer the matter in issue being swayed by the fact that common electronic portal had faced rough weather during the initial phase and that the statutory forms were not operationalized. The High Court was impressed by the argument of the writ petitioner that due to non-operability of the stated forms, the writ petitioner was denied of access to the relevant information, in particular about the ITC amount in its electronic credit ledger. This plea could not have been taken by the writ petitioner considering the obligation of self-assessment of ITC and of OTL and duty to pay self-assessed OTL. The eligibility of ITC and the right to exercise option to pay the

OTL through the mode of his choice would come later. For doing the self-assessment, the registered person is fully equipped with accounts and records maintained by him as per the statutory requirement, which are in his complete control and knowledge. In other words, the High Court committed manifest error in opining that the stipulation specified in the impugned Circular, is contrary to the provisions of the 2017 Act; whereas, express provisions of the 2017 Act provide to the contrary. Further, the High Court erroneously assumed that the writ petitioner had submitted the monthly Form GSTR-3B for the period of July to September 2017, based on its estimate. The writ petitioner cannot be permitted to take such a plea despite the statutory requirement of maintaining accounts and records as provided by the 2017 Act and the Rules framed thereunder. Furthermore, effecting correction/rectification in the returns for the month or quarter during which such omission or incorrect particulars have been noticed, does not in any way result in denying the right to avail ITC. The fact that respondent No.1 would not be eligible to get refund of cash also, cannot be the basis to permit the registered person to swap the entry in the electronic cash ledger with the entry in the electronic credit ledger or *vice versa.* No such mechanism has been provided

in the 2017 Act or the Rules framed thereunder. If permitted, even as one of the cases because of non-operability of the forms at the relevant time, may result in chaotic situation and collapse of the tax administration of the Union, States and the Union Territories.

25. *Per contra*, learned counsel for respondent No. 1 has supported the reasons as had weighed with the High Court in upholding the challenge and reading down paragraph 4 of the impugned Circular dated 29.12.2017 to the extent it restricts the rectification of Form GSTR-3B in respect of the period in which the error had occurred. It is emphasized that Form GSTR-3B is only a stop gap arrangement to overcome the technical glitches in the common electronic portal and non-operability of the concerned statutory forms enabling auto-populating of relevant entries and records. The fact that circumstances prevalent at the initial stages of introduction of common electronic platform has been acknowledged by the authorities and introduction of Form GSTR-3B is a testimony of that admission. Having done so, it was not open to the authorities to deny the taxpayers their dues, in particular, right to revise their returns and avail of ITC. The provision made in the impugned Circular dated 29.12.2017, not

permitting rectification of the return is conceptually flawed and not consistent with the legislative intent and the provisions of the 2017 Act and the Rules framed thereunder. It denies the taxpayer his statutory right to utilize credits, due to technical problems in not putting the electronic platform in place. The respondent realized that huge amounts of excess ITC is available in its books only after Form GSTR-2A was made operational in September, 2018. By not permitting the respondent to avail of ITC shown in the electronic credit ledger had resulted in collection of double tax from the respondent and an unfair advantage to the Government. Permitting the registered person to avail of the excess ITC in its electronic credit ledger, cannot be considered to be unfair advantage taken by the taxpayer.

26. The 2017 Act provided that in a Business to Business (B 2 B) transaction, a supplier (of goods/services) and a recipient (of goods/services) would interact with each other through a common electronic portal which as per the statutory framework was required to provision for payment of tax and furnishing of returns including availing/taking and utilization of credit. Sections 37, 38 read with Section 42 of the 2017 Act and Rules 59 and 60 of the 2017 Rules are indicative of the features that were required to be

provided in the common portal. It is supposed to provide for auto-populating of the records of supplier and the recipient including the facility of interaction of GSTN through Forms GSTR-1, 1A, 2, 2A and 3 and generation and filing of periodical returns. It contemplated an automatic matching, reversal and reclaim of ITC. The mechanism for rectification has been envisaged in Section 39(9) of the 2017 Act, which is subject to the steps to be taken under Sections 37 and 38 regarding matching and verification. The return to be filed in Form GSTR-3B had no such features and was only a stop-gap arrangement, as the mechanism provided in Sections 37 and 38 was not put in place. The provision regarding rectification under Section 39(9), therefore, had no application to the stop-gap arrangement of filing return in Form GSTR-3B, much less for the relevant period (July to September 2017). Hence, reliance placed on Section 39(9) of the 2017 Act to justify the stipulations specified in the impugned Circular dated 29.12.2017, cannot be countenanced.

27. It is urged that Form GSTR-3B is a summary return and does not contain the invoice-wise details. The recipient who had no access to the vendor's returns had no facility to verify the correctness of the ITC taken. Form GSTR-3B is a consolidated

return wherein the assessee manually files its total credit, OTL etc. The appellant cannot take advantage of its own failure of not being able to operationalize Forms GSTR-2 and GSTR-3 right at the inception when the provisions of the Act came into force. It is unfair and inequitable that failure of the department should benefit the department by forcing the registered person to discharge OTL. On the other hand, the assessees were given to understand right from 2015 that the system of return filing will be automated under GST. The entire industry and trade accordingly contemplated system changes based on these declarations i.e., return filing and taking/utilizing credit will be on the basis of auto-populated returns. Notably, three days before the implementation of GST, even though Sections 37, 38, 39, 42 and 43 were notified and were brought into force, the appellant issued Notification No. 10/2017 - Central Tax dated 28.06.2017 stating that the automated system will not be implemented and a summary manual return under Section 61(5) in Form GSTR-3B, which is "in lieu of" Form GSTR-3 has to be filed. The parameters specified in Form GSTR-3 were substituted in Form GSTR-3B. This arrangement was soon altered by issuing Notification No. 17/2017-Central Tax dated 27.07.2017, thereby amending Rule

61(5) retrospectively with effect from 01.07.2017, omitting the words "in lieu of" and expressly mentioning that Form GSTR-3B was introduced only till the period Sections 37 and 38 were not in operation. Further, Form GSTR-3B was only a stop-gap arrangement and while filing of Form GSTR-2 is operationalized, Form GSTR-3 of the preceding tax periods will be automatically generated and filled after acceptance/rejection contemplated under Sections 37 and 38 of the 2017 Act. In October 2019, by amending Rule 61(5) retrospectively making the return filed in Form GSTR-3B final return, the automated system contemplated under Sections 37 to 39 was formally done away with in the teeth of statutory mandate.

28. According to respondent No. 1, it is only after operationalization of GSTR-2A in September, 2018 that complete data for July to September 2017 became available to it and on the basis of which it wanted to revise the return filed for that period. It was possible to do so in terms of Circular No. 7/7/2017 dated 01.09.2017, which predicated that the details furnished in Form GSTR-3B will be corrected based on Forms GSTR-1 and GSTR-2 and will be auto-populated and will reflect in Form GSTR-3 in that particular month. However, that was done away with by

introducing impugned Circular No. 26/26/2017-GST dated 29.12.2017. The arrangement specified in the impugned Circular was against the spirit of the Act and the Rules framed thereunder. Hence, the High Court justly recorded that finding. It is urged that rectification/adjustment mechanism for the month when the errors are noticed is contrary to the scheme of the 2017 Act and would defeat the statutory right of the assessee by putting a fetter to not avail the ITC, though available in his account of electronic credit ledger. The High Court rightly read down paragraph 4 of the impugned Circular dated 29.12.2017 and also issued direction to allow the respondent to rectify Form GSTR-3B for the period to which error relates i.e., July to September 2017, subject to verification by the authorities concerned. This was obviously an equitable arrangement and not opposed to any provision of the Act or the Rules. This direction would enable the respondent to avail of the ITC from the surplus shown in his account of electronic credit ledger and the excess amount paid in cash would correspondingly be reinstated in electronic cash ledger of the respondent, which is to the tune of Rs.923 crores. As a matter of fact, the impugned Circular dated 29.12.2017 is wholly without jurisdiction as it arbitrarily alters the statutory framework. It is

also inconsistent with the return filing system under previous tax regime, such as Service Tax Rules, Central Excise Tax Rules, Delhi Value Added Tax Act, Income Tax Act etc. In all these legislations, it would have been open to the assessee to rectify the original self-assessed return at a later point of time. It is urged that the High Court was competent to issue writ of mandamus as it has been done in the present case.

29. We have heard Mr. N. Venkataraman, learned Additional Solicitor General of India for the appellant and Mr. Harish N. Salve and Mr. Tarun Gulati, learned senior counsel appearing for respondent No. 1.

30. At the outset, the preliminary issue raised by the appellant regarding jurisdiction of the Delhi High Court to entertain the writ petition or that the writ petition suffered from the vice of non-joinder of the necessary parties including that the High Court could not have issued a writ of mandamus, need not detain us. As regards the jurisdiction of the Delhi High Court, the registered office of respondent No. 1 is in Delhi. The appellant (respondent in the writ petition) also has its office in Delhi. The relief claimed in the writ petition amongst others, was to challenge provisions of the central Act and the circulars issued by the competent

authority having its office in Delhi. Hence, the jurisdiction of the Delhi High Court cannot be a matter of any doubt. Similarly, the argument of the appellant that State Governments/Union Territories are necessary parties, does not take the matter any further. As aforesaid, the writ petitioner was not challenging the individual action of the States or the Union Territories, but a policy decision of the Central authority who had issued the impugned Circular, namely, the Commissioner (GST). If the writ petitioner succeeded in that challenge, the consequential relief would follow. In our opinion, non-impleadment of respective States/Union Territories would not come in the way of the writ petitioner to pursue the cause brought before the High Court by way of subject writ petition. Even the argument regarding High Court having exceeded jurisdiction in issuing writ of mandamus, does not commend to us. If the conclusion reached by the High Court regarding the efficacy of impugned Circular was to be upheld, no fault can be found with the directions issued by it in paragraph 24 of the impugned judgment, reproduced above. Accordingly, the preliminary objections regarding the maintainability of the writ petition and the jurisdiction of the Delhi High Court deserve to be rejected.

31. Another issue that needs to be decided at the threshold is whether the impugned Circular dated 29.12.2017 issued by the Commissioner (GST) is without authority of law. Indisputably, the Circular has been issued to notify the clarification given by the Board in exercise of its powers conferred under Section 168(1) of the 2017 Act in order to consolidate the information in various notifications and circulars regarding return filing and to ensure uniformity in implementation across field formations. The decision was taken by the Board after considering various representations received seeking clarifications on various aspects of return filing such as return filing dates, applicability of quantum of late fee, amendment of errors in submitting/filing of Form GSTR-3B and other related queries. In strict sense, it is not the direction issued by the Commissioner (GST) as such, but it is notifying the decision(s) of the Board taken in exercise of its powers conferred under Section 168(1) of the 2017 Act. It is a different matter that a circular is issued under the signatures of Commissioner (GST), but in essence, it is notifying the decision(s) of the Board, which has had authority and power to issue directions. Accordingly, the argument that the impugned Circular

dated 29.12.2017 has been issued without authority of law, needs to be rejected.

32. Reverting to the analysis of the issues and contentions done by the High Court, it is primarily focused on the grievance of the writ petitioner that due to non-operability of Form GSTR-2A at the relevant time (July to September 2017), it had been denied of access to the information about its electronic credit ledger account and consequently, availing of ITC for the relevant period and instead to discharge the OTL by paying cash to its vendors. Thus, it has resulted in payment of double tax and unfair advantage to the tax authorities because of their failure to operationalize the statutory forms enabling auto-populating statement of inward supplies of the recipient and outward supplies including facility of matching and correcting the discrepancies electronically. The High Court, however, did not enquire into the cardinal question as to whether the writ petitioner was required to be fully or wholly dependent on the auto generated information in the electronic common platform for discharging its obligation to pay OTL for the relevant period between July and September 2017. The answer is - an emphatic No. In that, the writ petitioner being a registered person, was under a legal obligation to maintain books of accounts

and records as per the provisions of the 2017 Act and Chapter VII of the 2017 Rules regarding the transactions in respect of which the OTL would occur. Even in the past (till recently upto the 2017 Act came into force), during the pre-GST regime, the writ petitioner (being registered person/assessee) had been maintaining such books of accounts and records and submitting returns on its own. No such auto-populated electronic data was in vogue. It is the same pattern which had to be followed by the registered person in the post-GST regime.

33. As per the scheme of the 2017 Act, it is noticed that registered person is obliged to do self-assessment of ITC, reckon its eligibility to ITC and of OTL including the balance amount lying in cash or credit ledger primarily on the basis of his office record and books of accounts required to be statutorily preserved and updated from time to time. That he could do even without the common electronic portal as was being done in the past till recently pre-GST regime. As regards liability to pay OTL, that is on the basis of the transactions effected during the relevant period giving rise to taxable event. The supply of goods and services becomes taxable in respect of which the registered person is obliged to maintain agreement, invoices/challans and books of

accounts, which can be maintained manually/electronically. 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. This was the arrangement even in the pre-GST regime whilst discharging the obligation under the concerned legislation(s). The position is no different in the post-GST regime, both in the matter of doing self-assessment and regarding dealing with eligibility to ITC and OTL. 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 submitted/filed by the registered person.

34. Section 16 of the 2017 Act deals with eligibility of the registered person to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business. The input tax credit is additionally recorded in the electronic credit ledger of

such person under the Act. The "electronic credit ledger" is defined in Section 2(46) and is referred to in Section 49(2) of the 2017 Act, which provides for the manner in which ITC may be availed. Section 41(1) envisages that every registered person shall be entitled to take credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.

35. As aforesaid, every assessee is under obligation to self-assess the eligible ITC under Section 16(1) and 16(2) and "credit the same in the electronic credit ledger" defined in Section 2(46) read with Section 49(2) of the 2017 Act. Only thereafter, Section 59 steps in, whereunder the registered person is obliged to self-assess the taxes payable under the Act and furnish a return for each tax period as specified under Section 39 of the Act. To put it differently, for submitting return under Section 59, it is the registered person who has to undertake necessary measures including of maintaining books of accounts for the relevant period either manually or electronically. On the basis of such primary material, self-assessment can be and ought to be done by the assessee about the eligibility and availing of ITC and of OTL, which

is reflected in the periodical return to be filed under Section 59 of the Act.

36. Section 59 does make reference to Section 39, which deals with furnishing of returns, but the fact remains that for furnishing of returns, preparatory work has to be done by the assessee himself and is not fully or wholly dependent on the common electronic portal for that purpose. Just couple of weeks before the relevant period between July and September 2017, the writ petitioner/respondent No. 1 had been doing that exercise which it was expected to continue even under the post-GST scheme. The factum of non-operability of Form GSTR-2A, therefore, is flimsy plea taken by the writ petitioner/respondent No. 1. Indeed, if the stated form was operational, the same would have come handy to the writ petitioner for doing self-assessment regarding eligibility of ITC and availing thereof. But it is a feeble excuse given by the writ petitioner/respondent No. 1 to assail the condition specified in impugned Circular dated 29.12.2017 regarding the rectification of the return submitted manually in Form GSTR-3B for the relevant period (July to September 2017).

37. The question of reading down paragraph 4 of the said Circular would have arisen only if the same was to be in conflict

with the express provision in the 2017 Act and the Rules framed thereunder. The express provision in the form of Section 39(9) clearly posits that omission or incorrect particulars furnished in the return in Form GSTR-3B can be corrected in the return to be furnished in the month or quarter during which such omission or incorrect particulars are noticed. This very position has been restated in the impugned Circular. It is, therefore, not contrary to the statutory dispensation specified in Section 39(9) of the Act. The High Court, however, erroneously noted that there is no provision in the Act, which restricts such rectification of the return in the period in which the error is noticed. It is then noted by the High Court that as there is no possibility of getting refund of surplus or excess ITC shown in the electronic credit ledger, therefore, the only remedy that can enable the writ petitioner to enjoy the benefit of the seamless utilization of the ITC is by way of rectification in its annual tax return (Form GSTR-3B) for the relevant period. Further, the High Court in paragraph 23 of the impugned judgment, noted that the relief sought in the case before it, was indispensable. This logic does not commend to us. For, if there is no provision regarding refund of surplus or excess ITC in the electronic credit ledger, it does not follow that the assessee

concerned who has discharged OTL by paying cash (which he is free to pay in cash in spite of the surplus or excess electronic credit ledger account), can later on ask for swapping of the entries, so as to show the corresponding OTL amount in the electronic cash ledger from where he can take refund. Payment for discharge of OTL by cash or by way of availing of ITC, is a matter of option, which having been exercised by the assessee, cannot be reversed unless the Act and the Rules permit such reversal or swapping of the entries. As a matter of fact, Section 39(9) provides for an express mechanism to correct the error in returns for the month or quarter during which such omission or incorrect particulars have been noticed.

38. The entire edifice of the grievance of the writ petitioner (respondent No. 1) was founded on non-operability of Form GSTR-2A during the relevant period, which plea having been rejected as untenable and flimsy, it must follow that the writ petitioner/respondent No. 1 with full knowledge and information derived from its books of accounts and records, had done self-assessment and assessed the OTL for the relevant period and chose to discharge the same by paying cash. Having so opted, it is not open to the respondent to now resile from the legal option

already exercised. It is for that reason, the respondent has advisedly propounded a theory that in absence of (electronic-auto populated record) mechanism made available as per Sections 37 and 38, return filed in Form GSTR-3B is not ascribable to Section 39(9) of the 2017 Act read with Rule 61(5) of the 2017 Rules. This is yet another untenable plea taken by respondent No. 1. For, the appellant having realized that the mechanism specified in Sections 37 and 38 of the 2017 Act cannot be put in place due to non-operability of the forms governing such mechanism, had to amend the rules to make a stop-gap arrangement until the entire mechanism became operational. Appellant not only amended the statutory rule but also provided for filing of return manually in Form GSTR-3B electronically through the common portal with effect from July 2017. This is manifest from the circulars/notifications issued from time to time including the timeline for submitting the returns.

39. It is futile to urge that Section 39(9) has no application to the fact situation of the present case. In that, allowing filing of return in Form-GSTR-3B *albeit* a stop gap arrangement, is ascribable to Section 39 of the 2017 Act read with Rule 61 of the 2017 Rules. Indeed, it is not comparable to the mechanism specified for

electronically generated Form GSTR-3 referable to Rule 61. Nevertheless, Form GSTR-3B is prescribed as a "return" to be furnished by the registered person and by the subsequent amendment of Rule 61(5) brought into force with effect from 01.01.2017, it has been clarified that such person need not furnish return in Form GSTR-3 later on. Notably, the validity of that amendment including that of Notification dated 09.10.2019 bearing No. 49/2019, is not put in issue before us.

40. No doubt, in the initial stages, it was notified that Form GSTR-3B will be in lieu of Form GSTR-3 but that was soon corrected by deletion of that expression. At the same time, as the mechanism for furnishing return in terms of Sections 37 and 38 was not operationalized during the relevant period (July to September 2017) and became operational only later, the 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. It would still be considered as a return for all purposes though filled manually electronically.

41. The Gujarat High Court in the case of ***AAP & Co., Chartered Accountants through Authorized Partner vs. Union of India &***

Ors.[10], was called upon to consider the question whether the return in Form GSTR-3B is the return required to be filed under Section 39 of the 2017 Act. Although, at the outset it noted that the concerned writ petition had been rendered infructuous but, went on to answer the question raised therein. It took the view that Form GSTR-3B was only a temporary stop-gap arrangement till due date of filing of return Form GSTR-3 is notified. We do not subscribe to that view. Our view stands reinforced by the subsequent amendment to Rule 61(5), restating and clarifying the position that where return in Form GSTR-3B has been furnished by the registered person, he shall not be required to furnish the return in Form GSTR-3. This amendment was notified and came into effect from 01.07.2017[11] retrospectively. The validity of this amendment has not been put in issue.

42. The Delhi High Court in the impugned judgment, has taken note of decision of the Andhra Pradesh High Court in case of ***Panduranga Stone Crushers vs. Union of India & Ors.***[12] This decision dealt with the period between July 2017 and March 2018 for the financial year 2017-2018. The petitioner therein had

10 2019-TIOL-1422-HC-AHM-GST
11 Vide Notification/GSR No. 772(E) dated 9th October, 2019
12 2019-TIOL-1975-HC-AP-GST

submitted Form GSTR-3B return through GST portal, as required. While doing so, he had inadvertently and by mistake reported IGST input tax credit in a column relating to import of goods and services instead of placing that particular amount, namely, IGST input tax credit in all other ITC column. The writ petitioner asserted that he was entitled to rectify such mistake which had crept in Form GSTR-3B returns. The Union of India had contended that said situation was covered by Section 39(9) of the 2017 Act and the petitioner could rectify the omission, but did not avail the chance to rectify or modify the returns. Therefore, he was not entitled to relief as claimed in the writ petition. The Andhra Pradesh High Court relied on the decision of the Gujarat High Court in ***AAP & Co.***[13] and the decision of the Kerala High Court in ***Saji S. Proprietor, Adithya and Ambadi Traders & Anr. vs. The Commissioner, State GST Department & Anr.***[14], wherein the Kerala High Court had permitted the request for transfer of tax liability from the head "SGST" to "IGST", enabling the registered person to carry out rectification. The Andhra Pradesh High Court allowed the petitioner to follow the same suit. The view taken in these decisions though not assailed before this

13 supra at Footnote No. 10
14 dated 12.11.2018 in W.P.(C) No. 35868/2018

Court cannot impact the logic commended to us in this judgment on the basis of interpretation and application of the relevant provisions to the facts of this case.

43. The Delhi High Court in the present case then relied on the decision of the Punjab & Haryana High Court in the case of ***Adfert Technologies Pvt. Ltd. vs. Union of India & Ors.***[15] In that case, the petitioner was unable to file return before 31.12.2017 being the extended time due to heavy load upon accountants, who were having number of assesses, lack of proper knowledge of computer system, complexity in filling different columns of TRAN-1 etc. The Punjab & Haryana High Court noted that GST was an electronic based tax regime and most of people of India were not conversant with electronic mechanism and not able to load simple forms electronically. Be it noted that the factum of inability to access the electronic portal to submit return within the specified time due to technical faults in the portal is entirely different than the assertion to grant adjustment of amount voluntarily paid in cash by the assessee towards OTL. The latter can be allowed only if the law enacted by the Parliament expressly permitted such swapping of entries of the electronic credit ledger *vis-a-vis* electronic cash ledger; and certainly not permissible in

15 2019-TIOL-2519-HC-P&H-GST

the teeth of Section 39(9) of the 2017 Act. Relying on the decision of the Gujarat High Court in ***Siddharth Enterprises vs. The Nodal Officer***[16], however, the Court noted that denial of credit of tax/duty paid under existing Acts would amount to violation of Article 14 and 300A of the Constitution of India. It noted that unutilized credit has been recognized as vested right and property in terms of Article 300A of the Constitution. This decision was on facts of that case concerning erroneous entry recorded in Form GSTR-3B and not regarding right asserted to swap the mode of payment of OTL in cash to be adjusted against electronic credit ledger as in the present case in the guise of rectification of return filed in Form GSTR-3B for the earlier period.

44. Reference was then made to decision of this Court in ***MRF Ltd., Kottayam vs. Asstt. Commissioner (Assessment), Sales Tax & Ors.***[17], wherein it is held that a person may have a legitimate expectation of being treated in a certain way by an administrative authority, even though he has no legal right in private law to receive such treatment. The High Court then referred to the decision of Delhi high Court in ***Krish Authomotors***

16 2019-TIOL-2068-HC-AHM-GST
17 (2006) 8 SCC 702

Pvt. Ltd. vs. Union of India & Ors.[18], which had permitted the writ petitioners to either submit the TRAN-I form electronically by opening the electronic portal or to tender the said form manually before the specified date and thereafter to process the claim for ITC in accordance with law. The Punjab & Haryana High Court agreed with the view taken by the Gujarat High Court and the Delhi High Court. The conclusion so recorded by the Punjab & Haryana High Court will have no bearing on the facts of this case in light of the opinion expressed in this judgment, as we have held that consequent to submission/filing of Form GSTR-3B, as envisaged by the 2017 Act, it can be rectified only in the manner specified in Section 39(9) read with Rule 61(5), as applicable at the relevant time. In other words, 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.

45. The High Court in the impugned judgment, has also adverted to the decisions of the Delhi High Court in ***Blue Bird Pure Pvt. Ltd. vs. Union of India & Ors.***[19] and in ***Lease Plan India Private Limited vs. Government of National Capital Territory***

18 2019-TIOL-2153-HC-DEL-GST
19 2019 SCC OnLine Del 9250

of Delhi & Ors.[20] For the same reasons, the conclusion reached in the said two decisions will be of no avail to respondent No. 1.

46. We need not multiply the authorities referred to in the concerned judgments, and cited before us, as in our opinion, these decisions have not dealt with the cardinal aspect of statutory obligation fastened upon the registered person to maintain books of accounts and record within the meaning of Chapter VII of the 2017 Rules, which are primary documents and source material on the basis of which self-assessment is done by the registered person including about his eligibility and entitlement to get ITC and of OTL. 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 or for that matter, other forms, will be of no avail because the dispensation stipulated at the relevant time obliged the registered person to submit returns on the basis of such self-assessment in Form GSTR-3B manually on electronic platform. The provision contained in Section 39(9) of the 2017 Act and Rule 61 of the Rules framed thereunder, as applicable at the relevant time, apply with full vigor to the returns filed by the registered person in Form GSTR-3B.

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20 decided on 13.9.2019 in W.P.(C) No. 3309/2019

47. Significantly, 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. If at all, it is only a postponement of availment of ITC. The ITC amount remains intact in the electronic credit ledger, which can be availed in the subsequent returns including the next financial year. It is a different matter that despite the availability of funds in the electronic credit ledger, the registered person opts to discharge OTL by paying cash. That is a matter of option exercised by the registered person on which the tax authorities have no control, whatsoever, nor they have any role to play in that regard. Further, there is no express provision permitting swapping of entries effected in the electronic cash ledger *vis-a-vis* the electronic credit ledger or *vice versa.*

48. A *priori*, despite such an express mechanism provided by Section 39(9) read with Rule 61, it was not open to the High Court to proceed on the assumption that the only remedy that can enable the assessee to enjoy the benefit of the seamless utilization of the input tax credit is by way of rectification of its return

submitted in Form GSTR-3B for the relevant period in which the error had occurred. Any unilateral change in such return as per the present dispensation, would have cascading effect on the recipients and suppliers associated with the concerned transactions. There would be complete uncertainty and no finality could ever be attached to the self-assessment return filed electronically. We agree with the submission of the appellant that 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 of Union, States and Union Territories. Resultantly, 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.

49. As noted earlier, the matching and correction process happens on its own as per the mechanism specified in Sections 37 and 38, after which Form GSTR-3 is generated for the purposes of submission of returns; and once it is submitted, any changes thereto may have cascading effect. Therefore, the law permits rectification of errors and omissions only at the initial stages of

Forms GSTR-1 and GSTR-3, but in the specified manner. It is a different dispensation provided than the one in pre-GST period, which did not have the provision of auto-populated records and entries.

50. Suffice it to conclude that the challenge to the impugned Circular No. 26/26/2017-GST dated 29.12.2017, is unsustainable for the reasons noted hitherto. We hold that stipulations in the stated Circular including in paragraph 4 thereof, are consistent with the provisions of the 2017 Acts and the Rules framed thereunder. Having said that, it must follow that there is no necessity of reading down paragraph 4 of the impugned Circular as has been done by the High Court vide impugned judgment. In any case, the direction issued by the High Court being in the nature of issuing writ of mandamus to allow the writ petitioner to rectify Form GSTR-3B for the period - July to September 2017, in the teeth of express statutory dispensation, cannot be sustained.

51. No other issue has been dealt with by the High Court except to read down of the stated Circular, which as aforesaid, is wholly unnecessary.

52. In view of the above, this appeal is allowed. The impugned judgment and order is set aside. Resultantly, the writ petition

filed by respondent No. 1 before the High Court stands dismissed. There shall be no order as to costs.

All applications stand disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(Dinesh Maheshwari)

New Delhi;
October 28, 2021.