IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

RESERVED ON: 21.07.2023
DELIVERED ON:02.08.2023

CORAM:

THE HON'BLE MR. CHIEF JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

MAT 1218 OF 2023

WITH

I.A NO. CAN 1 OF 2023

SUNCRAFT ENERGY PRIVATE LIMITED AND ANOTHER

VERSUS

THE ASSISTANT COMMISSIONER, STATE TAX, BALLYGUNGE CHARGE AND OTHERS

Appearance:-
Mr. Ankit Kanodia, Adv.
Ms. Megha Agarwal, Adv.
Mr. Jitesh Sah, Adv.

.....for the Appellant

Mr. Anirban Ray, Ld. Govt. Pleader
Md. T.M. Siddiqui, Learned A.G.P.
Mr. S. Sanyal, Adv.

.....For the State Respondent

JUDGMENT

(Judgment of the Court was delivered by T.S. Sivagnanam, CJ.)

1. This intra Court appeal filed by the writ petitioner is directed against the order passed in WPA 12153 of 2023 dated 21.06.2023. The appellant had impugned the order passed by the Assistant Commissioner of State Tax, Ballygunge Charge, the Respondent No. 1 date 20.02.2023 by which the first respondent reversed the input tax credit availed by the appellant under the provisions of West Bengal Goods and Services Tax Act, 2017 (WBGST Act). The 4th respondent is a supplier of the appellant who provided supply of goods and services to the appellant who had made payment of tax to the fourth respondent at the time of effecting such purchase along with the value of supply of goods/ services. However, in some of the invoices of the said supplier was not reflected in the GSTR 2A of the appellant for the Financial Year 2017-18. The first respondent issued notices for recovery of the input tax credit availed by the appellant and the grievance of the appellant is that without conducting any enquiry on the supplier namely, the fourth respondent and without effecting any recovery from the fourth respondent, the first respondent was not justified in proceeding against the appellant. It is seen that a scrutiny of the return submitted by the appellant was made under Section 61 of the Act for the Financial Year 2017-18 which was followed by a notice dated 03.08.2022 stating that certain discrepancies were noticed. The appellant had submitted their reply dated 24.08.2022. Thereafter the appellant was served with the show-cause notice dated 06.12.2022 proposing a demand as to the excess ITC claimed by the appellant for the Financial Year 2017-18 on the basis of the difference of the

amount of ITC in Form GSTR-2A and Form GSTR-3B with respect to the purchase transaction made by the appellant with the fourth respondent. The appellant filed detailed replies on 06.01.2023 and 11.01.2023, denying the allegations made in the show-cause notice and among other things submitted that the appellant had made payment of tax to the fourth respondent arising from the transaction and thereafter availed ITC on the said purchase. The show-cause notice was adjudicated and by order dated 20.02.2023 a demand for payment of tax of Rs. 6,50,511/- along with applicable interest and penalty was confirmed under Section 73(10) of the Act. Challenging the said order, the appellant had filed the writ petition. The learned Single Bench by the impugned order disposed of the writ petition by directing the appellant to prefer a statutory appeal before the appellate authority after complying with the requisite formalities and the appellate authority was directed to dispose of the appeal without rejecting the same on the ground of limitation. Aggrieved by such order, the appellant has preferred the present appeal.

2. We have heard Mr. Ankit Kanodia assisted by Ms. Megha Agarwal and Mr. Jitesh Sah, learned Advocates for the appellant and Mr. T.M. Siddique, learned Government Counsel for the respondent.

3. For a dealer to be eligible to avail credit of any input tax, the conditions prescribed in Section 16 (2) of the Act have to be fulfilled. Sub-section (2) of Section 16 commences with a non-obstante clause stating that notwithstanding anything contained in Section 16 no registered person shall be entitled to credit of any input tax in respect of any supply of goods or services or both to him unless-

(a) he is n possession of tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;
(b) he has received the goods or services or both;
(c) subject to the provisions of Section 41 or Section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of such supply; and
(d) he has furnished the return under Section 39.

4. It is the case of the appellant that they have fulfilled all the conditions as stipulated under Sub-section (2) of Section 16 and they also paid the tax to the fourth respondent, the supplier and a valid tax invoice has been issued by the fourth respondent for installation and commission services and the appellant had made payment to the fourth respondent within the time stipulated under the provisions of the Act. Thus, grievance of the appellant is that despite having fulfilled all the conditions as has been enumerated under Section 16(2) of the Act, the first respondent erred in reversing the credit availed and directing the appellant to deposit the tax which has already been paid to the fourth respondent at the time of availing the goods/ services. In support of his contention, the learned Counsel for the appellant had placed reliance on the decision of the Hon'ble Supreme Court in ***Union of India (UOI) Versus Bharti Airtel Ltd. And Ors.***[1] The learned Advocate for the appellant also placed reliance on the press release dated 18.10.2018 issued by the Central Board of Indirect Tax and Customs and also the press release dated 04.05.2018 to substantiate their argument

[1] (2022) 4 SCC 328

that the ground on which the first respondent had passed the impugned order of recovery of tax is wholly unsustainable.

5. In the press release dated 18.10.2018 a clarification was issued stating that furnishing of outward details in Form GSTR-1 by the corresponding supplier(s) and the facility to view the same in Form GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of Section 16 of the Act. Further, it has been clarified that the apprehension that ITC can be availed only on the basis of reconciliation between Form GSTR-2B and Form GSTR-3B conducted before the due date for filing of the return in Form GSTR-3B for the month of September, 2018 is unfounded and the same exercise can be done thereafter also. In the press release dated 4th May, 2018, it was clarified that there shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however, reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.

6. The effect and purport of Form GSTR-2A was explained by the Hon'ble Supreme Court in ***Bharti Airtel Ltd.*** It was held that Form GSTR-2A is only a facilitator for taking a confirm 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 persons to submit return on the basis of

such self-assessment in Form GSTR-3B manually on electronic platform. In ***Arise India Limited and Ors. Versus Commissioner of Trade and Taxes, Delhi and Ors.[2],*** the challenge was to the constitutional validity of Section 9(2)(g) of the Delhi Value Added Tax Act, 2004 (DVAT Act) as being violative of Article 14 of 19(g) of the Constitution of India. Section 9(2) of the DVAT Act sets out the conditions under which tax credit or ITC would not be allowed. Sub-clauses (a) to (f) specify certain kinds of purchase which would not be eligible for the claim of ITC. Clause (g) of the Section 9(2) of the DVAT Act states that to the dealers or class of dealers unless the tax paid by the purchasing dealer has actually been deposited by the selling dealer with the Government or has been lawfully adjusted against output tax liability and correctly reflected in the return filed for the respective tax period, would not be eligible for claim of ITC. The question that arose for consideration was as to whether for the default committed by the selling dealer can the purchasing dealer be made to bear the consequences of the denying the ITC and whether it is the violation of Article 14 of the Constitution. After taking note of the language used in Section 9(2)(g) of the DVAT Act where the expression "dealer or class of dealers" occurring in Section 9(2)(g) of the DVAT Act should be interpreted as not including a purchasing dealer who has bona fide entered into purchase transaction with validly registered selling dealer who have issued tax invoices in accordance with Section 15 of the said Act where there is no mismatch of transactions in Annexures 2A and 2B and unless the expression "dealer or class of dealers" in Section 9(2)(g) is read down in the said manner, the entire provision would have to

[2] MANU/DE/3361/2017

be held to be violative of Article 14 of the Constitution. It was further held that the result of such reading down would be that the department is precluded from invoking Section 9(2)(g) of DVAT Act to deny the ITC to the purchasing dealer who had bona fide entered into a purchase transaction with the registered selling dealer who had issued a tax invoice reflecting the TIN number and in the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the department would be to proceed against a defaulting selling dealer to recover such tax and not denying the purchasing dealer the ITC. It was further held that where however, the department is able to come across material to show that the purchasing dealer and the selling dealer acted in collusion then the department can proceed under Section 40A of the DVAT Act. With the above conclusion, the default assessment orders of tax interest and penalty were set aside. The decision in ***Arise India Limited*** was challenged before the Hon'ble Supreme Court by the Government in ***Commissioner of Trade and Taxes, Delhi Versus Arise India Limited*** and the special leave petition was dismissed by judgment dated 10.01.2018, reported in ***MANU/SCOR/01183/2018.*** Though the above decision arose under the provisions of the Delhi Value Added Tax Act, the scheme of availment of Input Tax Credit continues to remain the same even under the GST regime though certain procedural modification and statutory forms have been made mandatory.

7. In the show cause notice dated 06.12.2022, the allegation was that the appellant had submitted that the fourth respondent has not shown the Bill in GSTR 1 and hence the appellant is not eligible to avail the credit of the

input tax as per Section 16(2) of the WBGST Act, 2017 as the tax charged in respect of such supply has not been actually paid to the Government. The show cause notice does not allege that the appellant was not in possession of a tax invoice issued by the supplier registered under the Act. There is no denial of the fact that the appellant has received the goods or services or both.

8. In the reply submitted by the appellant to the said show cause notice the appellant had clearly stated that they are in possession of the tax invoice, they had received the goods and services or both and the payment has been made to the supplier of the goods or services or both. The reason for denying the input tax credit is on the ground that the detail of the supplier is not reflecting in GSTR 1 of the supplier. The appellant had pointed out that they are in possession of a valid tax invoice and payment details to the supplier have been substantiated by producing the tax invoice and the bank statement. The appellant also referred to the press release dated 18.10.2018. What we find is that the first respondent has not conducted any enquiry on the fourth respondent supplier more particularly when clarification has been issued where furnishing of outward details in Form GSTR 1 by a corresponding supplier and the facility to view the same in Form GSTR 2A by the recipient is in the nature of tax payer facilitation and does not impact the ability of the tax payers to avail input tax credit on self-assessment basis in consonance with the provisions of Section 16 of the Act. Furthermore, it was clarified that there shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by seller. Further it is clarified that in case of default in payment of tax by the seller

recovery shall be made from the seller however, reversal of credit from the buyer shall also be an option available with the revenue authorities to address the exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.

9. The first respondent without resorting to any action against the fourth respondent who is the selling dealer has ignored the tax invoices produced by the appellant as well as the bank statement to substantiate that they have paid the price for the goods and services rendered as well as the tax payable there on, the action of the first respondent has to be branded as arbitrarily. Therefore, before directing the appellant to reverse the input tax credit and remit the same to the government, the first respondent ought to have taken action against the fourth respondent the selling dealer and unless and until the first respondent is able to bring out the exceptional case where there has been collusion between the appellant and the fourth respondent or where the fourth respondent is missing or the fourth respondent has closed down its business or the fourth respondent does not have any assets and such other contingencies, straight away the first respondent was not justified in directing the appellant to reverse the input tax credit availed by them. Therefore, we are of the view that the demand raised on the appellant dated 20.02.2023 is not sustainable.

10. In the result, the appeal is allowed, the orders passed in the writ petition is set aside and the order dated 20.02.2023 passed by the first respondent namely the Assistant Commissioner, State Tax, Ballygaunge Charge, is set aside with a direction to the appropriate authorities to first proceed against the fourth respondent and only under exceptional

circumstance as clarified in the press release issued by the Central Board of Indirect Taxes and Customs (CBIC), then and then only proceedings can be initiated against the appellant. With the above observations and directions the appeal is allowed.

(T.S. SIVAGNANAM, CJ.)

I Agree

(HIRANMAY BHATTACHARYYA, J.)

(P.A – PRAMITA/SACHIN)