November 22, 2023
Sl. No. 5
Court No.2
srm/s.biswas

In the Calcutta High Court
Circuit Bench at Jalpaiguri
Appellate Side

WPA 2449 of 2023

M/s. Laxmi Traders and another
vs.
Assistant Commissioner of State Tax,
Coochbehar Charge and others

Mr. Bikramadity Ghosh
Ms. Matan Chakraborty
... for the petitioners
Mr. Subir Kumar Saha, AGP
Mr. Nabankur Paul
Mr. Dilip Kumar Agarwal
... for the State

The order impugned has been passed by the Assistant Commissioner of State Tax, Cooch Behar Charge. By the order impugned, the petitioners were directed to pay a sum of Rs.6,13,861/- along with interest under Section 50(3) GST Act. Such claim was for the period 2017-18. The allegation was that although the Integrated Goods and Service Tax (IGST) was not paid and 'NIL' return had been filed by the seller, the petitioners had availed of input tax credit, contrary to law.

The petitioners have challenged the said order on the ground that the invoices with regard to payment to the seller would indicate that for every transaction for the said financial year with the particular seller, the IGST had been paid to the seller.

According to the petitioners, non-compliance of the law by the seller could not saddle the petitioners with the burden of refund of input tax credit which the petitioners had rightfully availed.

The petitioners further submit that the order impugned is without jurisdiction and issued in non-compliance of the statute and the press releases of the Board. Thus, the alternative remedy of appeal will not stand in the way of filing the writ petition.

Reliance has been placed on the invoices, from which it appears to the court that the invoices raised by the seller included the IGST component payable by the petitioners. The petitioners refer to the bank statements indicating that the said amount was transmitted through bank transfer to the account of the seller.

Reliance has been placed on a decision of the Division Bench of this court in the matter of **Suncraft Energy Private Limited and another vs. Assistant Commissioner, State Tax, Ballygunge Charge and others** reported in (2023) 77 GSTL 55.

A learned Single Judge had dismissed a similar writ petition being WPA 12153 of 2023 by directing the petitioners to avail of the alternative remedy of statutory appeal.

In the case before the Hon'ble Division Bench, the appellant/writ petitioners had impugned an order passed by the Assistant Commissioner of State Tax, Ballygunge Charge by which the input tax credit availed of by the appellant therein under the provision of the West Bengal Goods and service Tax Act, 2017, was reversed. The fourth respondent therein was the supplier who had provided goods and services to the appellant and the appellant claimed to have paid the IGST to the fourth respondent at the time of such purchase along with the value of the goods and services. The returns of the supplier, did not reflect. Thus, notices for recovery were issued to the appellant therein and grievance of the appellant was that without conduct of the enquiry against the supplier and without effecting recovery from the supplier, the appellant therein could not have been saddled with the proceeding under the Act. On scrutiny of the return submitted by the supplier, the discrepancies were noticed by the authority.

Ultimately, it was held by the Hon'ble Division Bench that without resorting to any action against the selling dealer, the authority could not have arbitrarily reversed the input tax credit availed of by the appellant. Unless exceptional case could be shown by the authority that the supplier was either missing or business of the supplier had been closed and the supplier did not have assets to remit the amount of IGST, the purchaser could not be saddled with the burden to refund the input tax credit along with interest.

Mr. Ghosh, learned counsel for the petitioners, thus prays for setting aside of the order impugned as the present case is identical to the case before the Hon'ble Division Bench.

Mr. Pal, learned advocate appearing for the authorities, submits that the input tax credit could only be availed of when the IGST was paid. It was found that nil returns for the period 2017-18 had been filed by the supplier. Thus, according to the provisions of Section 16(2)(c) of the West Bengal Goods and Service Tax Act, 2017 read with Central Goods and Service Tax Act and the Integrated Goods and Service Tax Act, 2017, the petitioners were liable to refund the input tax credit wrongly availed of by the petitioners, with interest.

Mr. Pal further submits that by online mode, in reply to the show cause notice dated July 12, 2023, the petitioners indicated that they were willing to pay the penalty, but wanted the interest amount to be reconsidered. This amounts to acceptance of the liability to pay the entire demand, apart from the interest claimed.

From the perusal of the order impugned, it appears that the authority proceeded on the basis that no explanation to the show cause notice was furnished by the petitioners. The authority did not record acceptance of the demand and also did not proceed on the basis that the petitioners had accepted the liability to pay the amount demanded. It further appears that the law has been settled by a Hon'ble Division Bench of this Court to the effect that before the buyer is proceeded against for reversal of the input tax credit on account of failure of payment of IGST, the supplier should be proceeded against. Only in exceptional cases, the authority could proceed against the buyer.

In this case, it appears that there are invoices which indicate that the IGST was paid to the seller. However, there is nothing on record to show that the seller had either wilfully suppressed such payment made by the petitioners or that the petitioners had actually paid the amount to the seller as raised in the invoices.

The facts which have been mentioned hereinabove and the documents which have been relied upon by Mr. Ghosh, learned Advocate appearing on behalf of the petitioners were not produced before the authorities. Rather, the petitioners, in the online mode, had made a request for reconsideration of the interest amount which gives rise to a presumption that the petitioners were willing to pay the other amounts, as claimed, with some reduction in the interest component. In the absence of any detailed letter of admission of the liability, it is difficult for this Court to understand the actual contentions of the petitioners before the authority. The authority, on the other hand, has recorded that no explanation was offered by the petitioner, but has not recorded in the order that there was a willingness on the part of the petitioners to pay the demand (penalty) and reduced interest.

Prima facie, it appears that the press release has been violated by the respondents. The law has been settled by the Hon'ble Division Bench in Suncraft Energy Private Limited (supra). Before the authority proceeds against the buyer, the authority should first proceed against the seller and only if exceptional circumstances, as clarified in the press release issued by the Central Board of Indirect Taxes and Customs, can be made out in a particular case, the buyer can be proceeded against.

However, the factual aspects which have been urged by Mr. Ghosh cannot be adjudicated by this Court. Whether there was an admission on the part of the buyer to pay up the money is also required to be further clarified.

Under such circumstances, this Court is of the view that the petitioners should be given a chance to approach the authority with all documents and contentions in respect of the demand raised.

The order impugned dated August 21, 2023 which was passed on the assumption that no explanation had been offered by the petitioners, is set aside on the ground that the petitioners were not able to produce any explanation and documents at the hearing, which are now being relied upon by them. The authority shall adjudicate the matter once again, by allowing the petitioners an opportunity to file their reply to the show cause with all documents and dispose of the matter in accordance with law upon hearing the petitioner No.2 or any other representative of the petitioner No.1. While doing so, the authority will consider whether at any point of time, the petitioners were agreeable to pay the amount by accepting their liability to pay the same, as there appears to be a reply filed online praying for reduction of interest.

The writ petition is, thus, disposed of.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)