IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1925 OF 2024

Damco India Private Limited ….Petitioner

V/s.

The Union of India and Ors. …Respondents

Mr. Sriram Sridharan a/w Mr. Shanmuga Dev i/b Mr. Sriram Sridharan for Petitioner.
Mr. Karan Adik a/w Ms. Sangeeta Yadav for Respondents.

CORAM : K.R. SHRIRAM &
JITENDRA JAIN, JJ.
DATED : 18th JUNE 2024

P.C. :

1. The matter pertains to the transition of credit as per Section 140(5) of the Central Goods and Services Tax Act, 2017 (CGST Act).

2. In this petition an order dated 1st November 2023 passed by Respondent No.2, the Assistant Commissioner (Tech), CGST and C.EX. on behalf of the Commissioner rejecting an application filed by petitioner seeking extension under the proviso to Section 140(5) of the CGST Act is impugned. Petitioner is also impugning an order dated 1st December 2023 passed by the Additional Commissioner, CGST and Central Excise being Respondent No.4 confirming the tax demand on the ground that the Jurisdictional Commissioner has rejected the application for extension on the ground that the application has not been filed within the prescribed time limit.

3. The implementation of the GST Regime subsumed various previous taxation regimes such as the Service Tax, Value Added Tax, Excise etc.

4. Owing to the shift, specific transitional provisions were made which allowed the taxpayers to take credit in their electronic GST Ledger equal to the unutilized credits available to the taxpayer under the previous taxation regime. These migration provisions have been specifically stipulated in Section 140 of the CGST Act which provides for the carry forward of old credits into the GST Regime.

5. Section 140(5) of the CGST Act provides that a registered person can take credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day on which duty or tax has been paid under the erstwhile regime, provided that the invoice is recorded in the books of accounts within a period of thirty days from the appointed day. First proviso to the said section provides that on sufficient cause being shown, the Commissioner may extend the period by a further period not exceeding thirty days. The relevant extract of the Section 140(5) is as under :

> *(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, within such time and in such manner as may be prescribed, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the*

> *books of account of such person within a period of thirty days from the appointed day :*
>
> *Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:*
>
> *Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.*

6. It is petitioner's case that it had received various invoices which were in transit during the transition period as on 1st July 2017, the service tax on which was paid by the service tax provider but the invoices were received after 1st July 2017. According to petitioner, it recorded majority of such invoices in its books of account in the month of July 2017. In June 2017 petitioner claims to have fallen prey to a cyber attack which crippled petitioner's operations. Petitioner is also relying upon a press release by the Ministry of Shipping, Government of India reporting about the cyber attack. It is petitioner's case that due to this cyber attack it could not record some such transit invoices in its books of account in the month of July and the same were recorded by petitioner in the books of account on or before 28th August 2017. Mr. Sridharan submitted that this has been accepted by respondent in Paragraph No. 39 of the impugned order dated 1st December 2023.

7. Petitioner thereafter applied for extension of period under the first proviso to Section 140(5) of the CGST Act to Respondent No.2, i.e., Commissioner, Mumbai Central, vide letter dated 26th October 2017 making

out a sufficient cause for extending the time period under Section 140(5) of the CGST Act. Petitioner transitioned eligible Cenvat credit under Section 140(5) of the CGST Act out of which Cenvat credit pertaining to invoices booked in the month of August 2017 was Rs.1,19,73,847/-. Respondent No.3 carried out a detailed investigation and called upon fresh documents from petitioner. Respondent No.3 even issued a Show Cause Notice dated 8th February 2022 and alleged that the Cenvat credit availed by petitioner was inadmissible and liable to be recovered because petitioner had failed to comply with certain provisions of Cenvat Credit Rules 2004 read with Section 16 and 140 of the CGST Act. Petitioner responded and by a letter dated 20th October 2023 once again sought approval for extension as stipulated in the first proviso to Section 140(5) of the CGST Act since petitioner did not receive any response to its request sent on 27th December 2017.

8. After this reminder the impugned order dated 1st November 2023 came to be passed following which the Show Cause cum Demand Notice dated 1st December 2023 was issued. According to Respondent under Section 140(5) of the CGST Act the tax payer needed to record the invoice or any other duty or tax paying document upto 30th July 2017 and further thirty days extension may be granted by the Commissioner. Since the application dated 27th December 2017 was submitted well beyond the statutorily permissible time limit, the same cannot be considered.

Therefore, the short issue in this petition is whether Section 140(5) of the CGST Act prescribes any time limit to make an application for extension to record in the books of account.

9. No affidavit in reply has been filed though stay has been granted from 29th January 2024 to the tax demand and extended from time to time. The stay is still in force.

10. Mr. Adik reiterated the stand taken in the impugned order and of course also submitted that petitioner could have availed the alternative remedy by filing an appeal.

11. Since the question was of interpreting the provisions of Section 140(5) of the CGST Act, we decided to exercise our jurisdiction under Article 226 of the Constitution of India.

12. Section 140(5) of the CGST Act reads as under :

> *Section 140*
>
> *xxxxxxxxx*
>
> *(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the existing law, within such time and in such manner as may be prescribed, subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day :*
>
> > *Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for*

> *a further period not exceeding thirty days :*
>
> *Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this sub-section.*
>
> *xxxxxxxxx*

13. Therefore, a registered person, which admittedly petitioner is, shall be entitled to take in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day which is 1st July 2017 subject to condition that :

(a) The duty or tax in respect of those services has been paid by the supplier under the existing law.

(b) The invoice or any other duty or tax paying document was recorded in the books of account of the registered person within a period of thirty days from the appointed day, i.e., on or before 31st July 2017.

The proviso to Section 140(5) of the CGST Act permits the Commissioner to extend the time of recording the invoices in the books of account by a further period of thirty days, i.e., by 28th August 2017 provided the registered person shows a sufficient cause. Sub Section 5 of Section 140 of the CGST Act does not provide for the date by which such an application for extension has to be filed. Sub Section 5 of Section 140 of the CGST Act only requires the supplier of service to have paid before the appointed day and the invoice or the duty or tax paying document being recorded in the books of account of registered person within a period of thirty days from the appointed day, i.e., 1st July 2017, which period could be extended by a further period of thirty days on sufficient cause being shown.

In our opinion, therefore, rejection of the application by the impugned order dated 1st November 2023 on the ground that it was filed only on 27th December 2017 is incorrect.

14. Therefore, we hereby quash and set aside the said order dated 1st November 2023.

In view of the above, the order dated 1st December 2023 also cannot survive and the same is also quashed and set aside.

15. At the same time, we note that in Paragraph No.39 of the order dated 1st December 2023, Respondent No.4 has recorded as under :

> *39. I find that the noticee has availed ITC of Rs.1,16,40,630/- on Table 7(b) of Tran-1 in their books of account in the month of August 2017 and one entry is of 31.07.2017 amounts to Rs.3,33,217/- on the basis of data provided by the noticee.*

Respondent No.4 as noted earlier, has rejected the ITC credit only on the basis that the application for extension has not been allowed under Section 140(5) of the CGST Act. Therefore, we remand the matter to Respondent No.4 to verify and pass appropriate orders on the claim of ITC credit made by petitioner as if extension has been granted under Section 140(5) of the CGST Act. How much credit claimed should be allowed, we are not making any observations thereon.

16. Respondent No.4 shall decide the matter on or before 30th September 2024. Before passing any order, Respondent No.4 shall give a personal hearing to petitioner, notice whereof shall be communicated atleast 7 working days in advance. The order to be passed shall be a reasoned and detailed order dealing with all the submissions of petitioner.

17. Petition disposed.

(JITENDRA JAIN, J.) **(K.R. SHRIRAM, J.)**