HIGH COURT OF CALCUTTA
Bench: CJ T.S. SIVAGNANAM AND JUSTICE HIRANMAY BHATTACHARYYA
Date of Decision: 02.05.2024

CIVIL APPELLATE JURISDICTION APPELLATE SIDE
MAT 2459 OF 2023 WITH IA NO. CAN 1 OF 2023
WPA 5222 OF 2024

LOKENATH CONSTRUCTION PRIVATE LIMITED

VERSUS

TAX/REVENUE GOVERNMENT OF WEST BENGAL AND OTHERS
AND
JOINT COMMISSIONER OF STATE TAX/REVENUE, LARGE TAX PAYERS UNIT AND OTHERS

Legislation:
Section 73(1) of the CGST Act, 2017/WBGST Act, 2017
Section 16(2)© of the CGST Act, 2017
Section 50 of the GST Acts

Subject: Appeals challenging the legality of a show-cause notice and subsequent order regarding denial of Input Tax Credit (ITC) based on alleged non-payment of tax by suppliers and related procedural irregularities.

Headnotes:

Procedural Violation in Show-Cause Notice – Appellant contested the show-cause notice issued by the WBGST Authorities on the grounds of procedural violations and denial of credit without verification from the supplier's end – High Court found the show-cause notice and subsequent order denying Input Tax Credit (ITC) to the appellant as procedurally flawed and lacking jurisdiction– Held: Show-cause notice and subsequent orders set aside, authorities directed to first proceed against the supplier and only then consider penalizing the appellant under exceptional circumstances. Allowed.[Para 3-9]

Referred Cases:

- Suncraft Energy Private Limited Versus Assistant Commissioner of State Tax (Cited within judgment)
- Bharti Airtel Ltd. Case (Cited within judgment)
- Arise India Limited and Ors. Versus Commissioner of Trade and Taxes, Delhi and Ors. (Cited within judgment)

Representing Advocates:

For Petitioner: Mr. Arnab Chakraborty, Mr. Aniket Chaudhury
For the State in MAT 2459 of 2023: Mr. T.M. Siddique, Ld. AGP, Mr. Tanoy Chakraborty, Mr. Saptak Sanyal
For CGST Authority: Mr. Uday Shankar Bhattacharya, Mr. Tapan Bhanja

JUDGMENT

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

1. The appeal and the writ petition were heard analogously and are disposed of by this common judgment and order.

2. We have heard Mr. Arnab Chakraborty and Mr. Aniket Chaudhury, learned Advocates appearing for the appellant/ petitioner, Mr. T.M. Siddique, learned A.G.P. assisted by Mr. Tanoy Chakraborty and Mr. Saptak Sanyal, learned Advocates appearing for the State in MAT 2459 of 2023 and Mr. Uday Shankar Bhattacharya and Mr. Tapan Bhanja, learned Advocates appearing for the CGST Authority.

3. MAT No. 2459 of 2023 has been filed challenging the order dated 04.12.2023 in WPA 2544 of 2023. In the said writ petition the appellant had challenged a show-cause notice dated 22nd August, 2023 issued by the WBGST Authorities on the ground that the notice has been issued without causing any verification from the supplier's end and denying credit to the appellant. The learned Writ Court disposed of the writ petition by directing the appellant to file the objection to the show-cause notice and the authority was directed to consider the same and take note of the judgment relied on by the appellant. The Court also directed that till the disposal of the objection no coercive action shall be taken against the appellant. It is contended before us by the learned Advocate for the appellant that in the writ petition the appellant had contended that the show-cause notice is without jurisdiction, more particularly in the light of the decision of this Court in Suncraft Energy Private Limited Versus Assistant Commissioner of State Tax [1]. During the pendency of the appeal the respondent authority had adjudicated the showcause notice and passed an order dated 28.12.2023 which was challenged in the writ petition in WPA 5222 of 2024 which has been tagged to be heard along with the appeal.

4. The respondent authority issued notice under Section 73 (1) of the CGST Act, 2017/ WBGST Act, 2017 dated 22.8.2023 holding that the appellant had

[1] (2023) 9 Centax 48 (Cal)

failed to produce any evidence from which it can be ascertained that the suppliers had paid tax to Government on those supplies (which are disclosed/ admitted by the suppliers in their statement in GSTR-I) and that the appellant had availed and utilized Input Tax Credit (IPC) in contravention of Section 16 (2)(c) of the Act. Therefore, it was proposed that ITC of Rs. 4,52,739.42/- (IGST) is found reversible along with interest, payable as per provisions of Section 50 of the GST Acts. Challenging the said show-cause notice the writ petition had been filed as stated above, which has been disposed of by the impugned order.

5. The adjudicating authority in the order dated 28.12.2023 has confirmed the demand made in the show-cause notice. We find from the said order certain findings recorded by the authority are outside the scope of the allegations in this show-cause notice. These findings are in page 6 of the adjudication order dated 28.12.2023 which pertained to the allegation that the appellant who claimed to have received manpower services only did not conclusively prove whether he actually availed the services or not and that the appellant had not produce documents like the register of workers, the name of workers against whom the invoices were raised etc. from where it may be concluded that the actual service has been procured by the RPP for furtherance of his business. As a rightly pointed out by the learned Advocate for the appellant these were never part of the allegation in the show-cause notice. The adjudicating

authority has admitted that the appellant has produced two certificates issued by the Chartered Accountants declaring that the suppliers had discharged the liability in corresponding GSTR-3B for the relevant periods. The adjudicating authority proceeded to reject those certificates issued by the Chartered Accountants by observing that they do not match with the facts stated in the returns as available in GST common portal. If there was any clarification required for the assessee, it would have been well open to the adjudicating authority to call upon the assessee to do so and without such opportunity the adjudicating authority unilaterally proceeded with the matter. The law and the subject was considered by the Court in the case of Suncraft Energy Private Limited.

6. In the said case the assessee had impugned the order of the assessing officer who reversed the Input Tax Credit availed by the assessee therein under the provisions of the WBGST Act. In the said case the private respondent was the supplier of the assessee who provided supply of goods and services to the assessee who had made payment of tax to the private respondent at the time of effecting such purchase along with supply of goods/ services. However, in some of the invoices of the said supplier were not reflected in the GSTR-2A of the assessee for the Financial Year 2017-18. In the said case the assessing authority issued notices for recovery of ITC to which the assessee objected by stating that without conducting any enquiry of the supplier who was the private respondent of the said proceedings and

without effecting any recovery from the supplier the Assessing Officer was not justified in proceeding against the assessee. There are two show-cause notices issued for which reply was submitted by the assessee. The notice was adjudicated and the demand raised in the show-cause notice was affirmed. The said order was challenged by filing a writ petition which was disposed of by directing the petitioner therein to file a statutory appeal. Aggrieved by such order, the intra court appeal was preferred before this Court. The Court considered the scheme of the Act and held as follows:

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.

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 nonoperability 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. MANU/DE/3361/2017, 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 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.

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 MAT 1218 OF 2023
REPORTABLE 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.

7. Against the above judgment the State preferred an appeal before the Hon'ble Supreme Court which was dismissed as reported in (2023) 13 Centax 189 (SC).

8. The decision in Suncraft Energy Private Limited applies with full force to the case on hand. Admittedly, the adjudicating authority without resorting to any action against the supplier who is the selling dealer, had ignored the tax invoices produced by the appellant as well as the certificates issue by the Chartered Accountants which is erroneous and wholly without jurisdiction. It is interesting to note in the facts of the instant case that even in the showcause notice the authority has admitted that "it is true that the recipient has made payment the element of tax to the supplier against such transaction but the payment of such tax has not been reciprocated to the exchequer". If the authority has admitted the fact that the recipient who is the appellant has made payment of the tax to the supplier against the transaction and if it is a case of the department that such tax has not been remitted to the State exchequer, the elementary principle to be adopted is to cause enquiry with the supplier and without doing so to penalise the appellant would be arbitrary, illegal and without jurisdiction.

9. For all the above reasons the appellant is entitled to succeed. Accordingly, the appeal is allowed. The order passed in the writ petition is set aside and

the writ petition is allowed. The order impugned in the writ petition dated 28.12.2023 is set aside as well as the show-cause notice dated 22.08.2023 is set aside with a direction to the authorities to first proceed against the supplier and only under exceptional circumstances as clarified in the press release issued by the Central Board of Indirect Taxes and Customs (CBIC) and then only proceedings can be initiated against the appellant.