

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10395 of 2023

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M/s Aastha Enterprises through its Proprietor Sanjay Kumar, Male, aged about 48 years, Son of Krishna Prasad, Resident of Village - Behea, P.S. - Bihia, District - Bhojpur, Bihar - 802152.

... .. Petitioner/s

Versus

1. The State of Bihar through the Commissioner of Commercial State Taxes, New Secretariat, Patna.
2. The Joint Commissioner, State Taxes, Shahabad Circle, Bhojpur at Ara, Bihar.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mrs.Archana Sinha, Advocate
For the State : Mr. Vivek Prasad, G.P.-7

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 18-08-2023

1. The issue raised in the above writ petition is as to the sustainable claim of Input Tax Credit, when it has been proved that the purchaser, a registered dealer has satisfied the tax liability to the selling dealer, another registered dealer,



evidenced by a tax invoice; even when the selling dealer does not pay the said tax to the Government after collecting it from the purchaser. Whether the purchasing dealer can be denied Input Tax Credit evidenced by the invoice and is not the State obliged to take proceedings against the selling dealer, who defaulted payment of collected tax to the State; for which the statute provides ample scope, is the question raised.

2. The question unfortunately is raised against an assessment order on which there is a statutory appeal provided. The assessment order is dated 24/25.05.2022 and as per Section 107 of the Bihar Goods and Services Tax Act, 2017 (for brevity “BGST Act”) an appeal has to be filed within three months and with sufficient cause shown for the delay occasioned, within a further period of one month. It is trite that an appeal would not lie after the specific period provided for delay condonation. Hence, an appeal ought to have been filed either as on 24.08.2022 or with a delay condonation application within 24.09.2022. Admittedly, no appeal has been filed and the petitioner has filed the above writ petition long after the period of appeal has expired. Be that as it may, we proceed to consider the issue raised, since it falls for interpretation of the provision enabling Input Tax Credit under the BGST Act.



3. Smt. Archana Sinha, learned counsel appearing for the petitioner points out that the purchases were made after making payments through bank accounts. Invoices were issued by the selling dealer which is also produced as Annexure-1 series. Annexure-1 series shows the invoice issued by the selling dealer, evidencing the payment of the value of the goods along with the tax, by the purchasing dealer through bank account and the movement of the goods purchased. Obviously, the selling dealer has not paid up the tax liability, to the State, which stood satisfied by the purchasing dealer and collected by the selling dealer. The underlying object of Input Tax Credit regime brought in, is to avoid the cascading effect of tax and this would be totally frustrated if the department officials attempt recovery of tax from the purchasing dealer, which tax liability has already been satisfied by payment of the tax component, to the selling dealer. The recovery now sought has the character of a double taxation and it should be the department who proceeds against the selling dealer to recover the collected amount of tax; which if not paid after collection, entails penalties under the tax enactment. Learned counsel for the petitioner also relied on two decisions of learned Single Judges of the Madras High Court. ***Sri Vinayaga Agencies v. The Assistant Commissioner (CT) &***



Anr. in WP Nos. 2036 to 2038 of 2013 dated 29.01.2013 and WP (MD) No. 2127 of 2021 and connected cases; M/s D.Y. Beathel Enterprises v. The State Tax Officer (Data Cell) dated 24.02.2021. It is argued that the reasoning squarely applies in the above case.

4. The Government Advocate, however, relies on Section 16 of the BGST Act and argues that the Input Tax Credit is tied to certain conditions stipulated under the provision; non-fulfilment of which would result in denial of such credit. On facts it is submitted that the petitioner did not respond to the show cause notice and the reminder served and it was hence there was an *ex-parte* order passed. It is pointed out that *ALD. Automotive Pvt. Ltd. v. The Commercial Tax Officer & Ors. (Civil Appeal Nos. 10412-10413 of 2018)* held that Input Tax Credit is in the nature of a benefit/concession and not a right extended to the dealer under the statutory scheme, which benefit can accrue to the assessee only as per the scheme of the statute. *Godrej & Boyce Mfg. Co. Pvt. Ltd. and Others v. Commissioner of Sales Tax and Others; 1992 (3) SCC 624* was also relied on to urge that the rule making authority can provide restrictions in extending the concession.

5. We will first look at the decisions placed before us



by the learned counsel for the petitioner. *Sri Vinayaga Agencies* was followed in *M/s D.Y. Beathel Enterprises*; the former under the VAT Act and the latter under the GST Act. Under the VAT Act in the State of Tamil Nadu Section 19 provided that, Input Tax Credit of the amount of tax paid or payable under the Act by the registered dealer to the seller; on his purchase of taxable goods, specified in the First Schedule, shall be available. The proviso required that the registered dealer who claims Input Tax Credit should establish that the tax due on such purchase has been paid by him in the manner prescribed. Sub-section (16) of Section 19 also provided that the Input Tax Credit availed by a registered dealer would only be provisional and the assessing authority is empowered to reverse the same, if it appears that the claim was incorrect, incomplete or otherwise not in order. The learned Single Judge found that the power of revocation does not extend to contingencies of non-payment of tax by the selling dealer. In the case before Court, the petitioner dealer had admittedly paid the tax to the selling dealer and on raising the claim of Input Tax Credit, even the department accepted the payment made by the purchasing dealer. It was held that in that circumstance, the department ought to have proceeded against the selling dealer for recovery of tax in the manner known to



law and the revisional orders reversing the Input Tax Credit under sub-section (16) of Section 19 was totally incorrect, erroneous and contrary to the provisions of the Tamil Nadu Value Added Tax Act and Rules.

6. *M/s D.Y. Beathel Enterprises* specifically noticed the afore-cited decision and found that it was under the VAT Act. Section 16 (1) & (2) of the GST Act was quoted and it was held that when the seller has collected tax from the purchasing dealer, the omission on the part of the seller to remit the tax in question should be viewed very seriously and strict action ought to have been initiated against the seller. The impugned orders were quashed on the ground that the selling dealer was not examined and on the ground that there was no recovery initiated against the selling dealer. We have to notice immediately that the second cited decision ignored the provision under sub-clause (c) of Section 16 (2) of the GST Act.

7. Section 16(1) and (2) (a),(b),(c) & (d) are extracted hereinunder:-

“16. Eligibility and conditions for taking input tax credit.—

(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled 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 and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

- (a) he is in possession of a 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.*

Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

- (c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and*
- (d) he has furnished the return under section 39”*

8. Sub-section (1) of Section 16 deals with the eligibility of a registered person to avail of Input Tax Credit on any supply of goods, or services or both which are used or intended to be used in the course or furtherance of his business and the said amount is to be credited to the electronic credit



ledger of such person. The conditions for enabling such benefit, are available in Clauses (a) (b) and (c) which are in seriatim; the existence of a tax invoice or debit note issued by the supplier, proof of receipt of goods or services or both and the tax charged in respect of such supply having been actually paid to the Government, either in cash or through utilization of Input Tax Credit admissible in respect of the said supply. The said conditions are to be satisfied together and not separately or in isolation, and these are the conditions and restrictions which would regulate the availment of Input Tax Credit. Input Tax Credit by the very nomenclature contemplates a credit being available for the purchasing dealer in its credit ledger by way of payment of tax by the supplier to the Government.

9. In this context, we refer to a decision of the Hon'ble Supreme Court in *The State of Karnataka v. M/s Ecom Gill Coffee Trading Private Limited; Civil Appeal No. 230 of 2023* which was disposed of along with a batch of appeals. The first batch of appeals were in which the purchasing dealer claimed Input Tax Credit solely on the ground that the sale price, which included tax, was paid to the seller by an account payee cheque and that copies of invoices were provided. In one of the cases, relating to one *M/s Tallam*



Apparels, the purchase of readymade garments was from dealers who had their registration cancelled and those who filed 'NIL' returns. In the case of *M/s Ecom Gill Coffee Trading Private Limited*, the Assessing Officer having entertained doubts about the Input Tax Rebate Claim; sought production of accounts, books, tax invoices etc. Out of the 27 sellers, six were found to be de-registered, three having not paid up the taxes, the remaining six denied the turnover and failed to pay taxes. Similar contentions were taken up before the Hon'ble Supreme Court, which were rejected primarily on the basis of Section 70 of the Karnataka Value Added Tax Act, 2003 which saddled the assessee with the burden of proving *inter alia* any claim to Input Tax under the Act. It was held that the dealer who claims Input Tax Credit has to prove beyond doubt, the actual transaction by furnishing the name and address of the selling dealer, details of the vehicle delivering the goods, payment of freight charges, acknowledgment of taking delivery of goods, tax invoices and payment particulars etc. It was also held that to sustain a claim of Input Tax Credit on purchases, the purchasing dealer would have to prove and establish the actual physical movement of the goods & genuineness of transactions, by furnishing the details referred to above and mere production of tax invoices would not



be sufficient to claim ITC.

10. Learned counsel for the petitioner had specifically argued that the said decision of the Hon'ble Supreme Court can be distinguished especially looking at Section 70 of the KVAT Act and also the petitioner herein having produced not only the invoices but also the account details and the documents evidencing transportation of goods. However, we have to notice that this does not absolve the assessee from the rigor provided under sub-clause (c) of Section 16(2) of the BGST Act, which requires the credit of tax, collected from the purchasing dealer; either in cash or through utilization of admissible Input Tax Credit, being available in the context of the supplier having actually paid tax to the Government. This in effect is a burden of proof cast on the purchasing dealer who claims Input Tax Credit, which is a right created under statute; sustained only under the specific terms of the statute.

11. It is true that Input Tax Credit is a concept introduced in the tax regime, all over the country for the purpose of avoiding the cascading effect of taxes. The benefit of such credit being availed by a purchasing dealer who sells or manufactures goods, using raw materials on which tax has been paid is a benefit or concession conferred under the statute as has



been held in *ALD. Automobile Private Limited*. Necessarily, the conditions for such avilment of credit has to be scrupulously followed failing which there can be no benefit conferred on the assessee. The benefit is one conferred by the statute and if the conditions prescribed in the statute are not complied; no benefit flows to the claimant.

12. The contention of double taxation does not impress us especially since the claim is denied only when the supplier who collected tax from the purchaser fails to pay it to the Government. Taxation as has been held is a compulsory extraction made for the purpose of public good, by the welfare State and without the levy being paid to the Government; there can be no claim raised of the liability to tax having been satisfied and hence there is no question of double taxation.

13. The further contention raised by the assessee is also one of the statute having provided measures to recover the collected tax, which the selling dealer fails to pay to the Government. The mere fact that there is a mode of recovery provided under the statute would not absolve the liability of the tax payer to satisfy the entire liability to the Government. The purchasing dealer being the person who claims Input Tax Credit could only claim the Input Tax benefit if the supplier who



collected the tax from the purchaser has paid it to the Government and not otherwise. The Government definitely could use its machinery to recover the amounts from the selling dealer and if such amounts are recovered at a later point of time, the purchasing dealer who paid the tax to its supplier could possibly seek for refund. However, as long as the tax paid by the purchaser to the supplier, is not paid up to the Government by the supplier; the purchaser cannot raise a claim of Input Tax Credit under the statute. We have to notice that the word 'Input Tax Credit' itself postulates a situation where the purchasing dealer has a credit in the ledger account maintained by it with the Government. The said credit can only arise when the supplier pays up the tax collected from the purchaser. The mere production of a tax invoice, establishment of the movement of goods and receipt of the same and the consideration having been paid through bank accounts would not enable the Input Tax Credit; unless the credit is available in the ledger account of the purchasing dealer who is an assessee.

14. The seller and purchaser have an independent contract without the junction of the Government. The statute provides for a levy of tax on goods and services or both, supplied by one to the other which can be collected but the



dealer who collects it has also the obligation to pay it up to the State. The statutory levy and the further benefit of Input Tax Credit conferred on the purchasing dealer depends not only upon the collection by the seller but also the due payment by the seller to the Government. When the supplier fails to comply with the statutory requirement, the purchasing dealer cannot, without credit in his account claim Input Tax Credit and the remedy available to the purchasing dealer is only to proceed for recovery against the seller. Even if such recovery from the supplier is effected by the purchasing dealer; the State would be able to recover the tax amount collected and not paid to the exchequer, from the selling dealer since the rigor of the provisions for recovery on failure to pay up, after collecting tax, enables the Government so to do.

15. It is clear that the literal nomenclature and the statutory language, mandates that there should be credit available in the credit ledger of the purchaser to claim Input Tax and otherwise the claim would be frustrated. On the above reasoning, we have to find that the claim of Input Tax Credit raised by the petitioner cannot be sustained when the supplying/selling dealer has not paid up the amounts to the Government; despite collection of tax from the purchasing



dealer.

16. The writ petition would stand dismissed leaving the parties to suffer their respective costs.

(K. Vinod Chandran, CJ)

Partha Sarthy, J: I agree.

(Partha Sarthy, J)

P.K.P./-

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