

Court No. - 10

Case :- WRIT TAX No. - 228 of 2021

Petitioner :- M/S Ashish Trading Company

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Pranjal Shukla

Counsel for Respondent :- C.S.C.

with

Case :- WRIT TAX No. - 229 of 2021

Petitioner :- M/S Ashish Trading Company

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Pranjal Shukla

Counsel for Respondent :- C.S.C.

with

Case :- WRIT TAX No. - 230 of 2021

Petitioner :- M/S Ashish Trading Company

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Pranjal Shukla

Counsel for Respondent :- C.S.C.

with

Case :- WRIT TAX No. - 231 of 2021

Petitioner :- M/S Ashish Trading Company

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Pranjal Shukla

Counsel for Respondent :- C.S.C.

Hon'ble Rohit Ranjan Agarwal,J.

Heard Sri Pranjal Shukla, learned counsel for the petitioner and Sri A.C. Tripathi, learned Standing Counsel for the State.

These writ petitions have been filed assailing the order passed by the Assessing Authority reversing the ITC and the order passed by the Additional Commissioner, Grade-II in appeal dated 20.10.2020 conforming the order of Assessing Authority.

The facts, in nutshell, are that petitioner is a proprietorship firm and engaged in a business of purchasing and selling of empty tin boxes. The petitioner's firm is registered with the taxing authority under Goods & Services Tax Act, 2017 (hereinafter referred as the 'Act of 2017'). The disputes relates to the assessment year 2019-20 . A show cause notice was issued to the petitioner on 09.12.2019 under Section 74 of the Act. The petitioner replied the show cause notice online.

The Deputy Commissioner vide order dated 23.01.2020 rejected the reply submitted by the petitioner. Aggrieved by the said order an appeal was preferred by the petitioner before the first Appellate Authority. A specific ground was taken that all the GST was deposited timely and all the relevant documents were placed before the authorities and the claim of ITC was wrongly cancelled by the Assessing Authority. The first Appellate Authority vide judgment dated 20.10.2020 dismissed the appeal mainly on the ground that the firm which had supplied the goods to the petitioner's firm, i.e. M/s Riddhi Siddhi Enterprises, Agra, its registration was already cancelled and moreover the petitioner has not mentioned any amount for loading and unloading of the goods.

Sri Pranjal Shukla, learned counsel for the petitioner, has submitted that a categorical finding has been returned by the first Appellate Authority that all the documents such as tax invoice, e-way bill, bilty, supply ledger accounts as well as transporter bilty was submitted before the authority and same has been verified by the first Appellate Authority and same has come up in its order, but solely on the ground that no amount of loading and unloading of the goods has been mentioned in the accounts, the claim of ITC has been rejected. He further contends that the registration of the supplier firm M/s Riddhi Siddhi Enterprises, Agra was cancelled on 13.08.2019

subsequent to the date of transaction of goods and, thus, finding recorded by the first Appellate Authority is patently erroneous.

Sri A.C. Tripathi, learned Standing Counsel, appearing for the department, has submitted that a categorical finding has been recorded by the first Appellate Authority that the registration of the supplier firm was cancelled, as such, no benefit of ITC could be availed by the petitioner. He has invited the attention of the Court to Section 16 of the Act of 2017 which is eligibility and conditions for taking input tax credit as well as Section 74 of the Act of 2017. According to learned Standing Counsel the transaction was fake and no goods had passed on from the supplier to the purchaser i.e. petitioner and only the ITC has been claimed on exchange of documents and, thus, the authorities have rightly rejected the claim of ITC.

I have heard learned counsel for the parties and perused the material on record.

Before proceeding to decide the case a conspicuous glance of Section 16 and Section 74 of the Act of 2017 is necessary for better appreciation of the case, which reads as under;

"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:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order. (10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.—For the purposes of section 73 and this section,—

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

From perusal of Sub-section (1) of Section 16 it is clear that

input tax credit can be claimed only on fulfillment of certain conditions. Sub-section (2) of Section 16 provides that 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 the conditions as mentioned in Sub-clauses (a) and (b) of Sub-section (2) of Section 16 is fulfilled.

Moreover, Section 74 of the Act of 2017 provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts. Sub-section (1) empowers the officer to issue a show cause notice that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, and upon the adjudication, the assessee is required to pay the amount specified in notice alongwith interest, and penalty may be imposed in view of Section 50 of the Act.

From reading of both the Sections 16 and 74 of the Act of 2017, it is clear that the Legislature has provided the benefit of input tax credit to those assessee who had supplied goods or services and are registered dealers and further on the requirement being fulfilled as per the provisions can make claim. Section 74 puts embargo and places a restriction and gives a handle to the authorities that in case of availing the benefit wrongfully or by reasons of fraud or willful mis-statement of the fact a notice is issued to the assessee and upon adjudication amount is recovered and ITC claimed is reversed.

In the present case a show cause notice was issued to the assessee on 09.12.2019 which was replied by the assessee. The claim was rejected vide order dated 23.01.2020, thereafter, the

appellate authority while confirming the order of cancellation of ITC had recorded a categorical finding to the effect that though all the documents were placed on record by the assessee yet it was found that no evidence was placed on record in regard to the payment made for loading and unloading of the goods.

Further, the Appellate Authority has recorded a finding to the effect that the registration of supplier of the goods M/s Riddhi Siddhi Enterprises, Agra has been cancelled and said firm was not carrying on any business from the premises as alleged in the documents placed before the authority.

This Court finds that finding recorded by the first Appellate Authority is cryptic as it only states in its order that the registration of the supplier was cancelled, but no date of cancellation has been mentioned so as to demonstrate whether transaction took place prior to cancellation or subsequently. Moreover, the first Appellate Authority had discarded the claim of ITC on the ground that no records of payment of loading and unloading of goods were brought before it.

This Court finds that the finding recorded by the first Appellate Authority cannot be sustained and the same is hereby set-aside. The matter is remanded to the first Appellate Authority to record specific finding as to when the registration of supplier i.e. M/s Riddhi Siddhi Enterprises, Agra was cancelled. Moreover, the first Appellate Authority shall record as to when the inquiry was conducted as to whether any business activity was carried out by the supplier firm. The said exercise shall be completed by the first Appellate Authority within a period of six weeks from the date of production of certified copy of this order.

It is made clear that in case the first Appellate Authority requires any further information either from the assessee or in

regard to the registration of the firm M/s Riddhi Siddhi Enterprises, Agra, it shall be done within two weeks.

Writ petitions are partly allowed.

Order Date :- 6.12.2022

Shekhar