



Newsflash

Calcutta High Court - Denial of ITC for non-reflection of invoices in GSTR-2A without investigating the supplier is unsustainable and not justified

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1.0 Background:

In this newsflash, we seek to analyse a recent judgement pronounced by the Hon'ble Calcutta High Court in the case of ***Suncraft Energy Private Limited and Another Vs The Assistant Commissioner, State Tax, Ballygunge Charge and Others [2023 (8) TMI 174 - CALCUTTA HIGH COURT]***.

The judgement primarily pertains to the issue of claiming of input tax credit by a recipient during early years of GST implementation and the same being disputed by the ground level authorities for non-reflection of the details in auto-generated report in Form GSTR 2A of the recipient. The matter has been litigated since quite a while now especially in the light of barrage of notices served upon the recipients by the departmental authorities identifying discrepancies in the nature of 'GSTR 2A vs GSTR 3B' mismatch. Further, the said judgement would seek to carry a persuasive value and aid the bona fide recipients who have due taxes with respect to their procurements to the concerned supplier and are unnecessarily facing the brunt of the lapses at the end of the supplier.

2.0 Facts of the case:

- 2.1 ***M/s Suncraft Energy Private Limited*** (hereinafter referred to as '**the Appellant**') was served with a show cause notice proposing a demand in relation to the excess input tax credit (hereinafter abbreviated as '**ITC**') claimed for the financial year 2017-18 on the basis of differences in the amount of ITC reflecting in auto-populated report available in Form GSTR-2A based on the details of outward supplies reported by the corresponding supplier(s) vis-à-vis the ITC availed by the appellant vide filing of return in Form GSTR-3B i.e. the periodic return filed by taxpayers under GST.
- 2.2 While responding in a detailed manner to the show cause notice issued, the Appellant denied the allegations contained therein by stating that they had availed ITC on applicable transactions only, post making payment of taxes to the supplier of goods/ services (in the present case, installation and commission services).
- 2.3 The notice culminated into issuance of an adverse order confirming demand of tax amounting to INR 6,50,511 along with interest and penalty as applicable under the provisions of Section 73(10) of the CGST Act, 2017 ('the Act'). Being aggrieved by the order passed by the Ld. Assistant Commissioner of State Tax, Ballygunge Charge (hereinafter referred to as '**the adjudicating authority**'); the appellant challenged the same by way of a writ petition.
- 2.4 The learned Single Bench, however, did not examine the merits of the case and disposed of the petition by directing the Appellant to prefer a statutory appeal before the appellate

authority, post complying with the requisite formalities. Against this order, the Appellant preferred the present appeal before the Hon'ble Calcutta High Court.

3.0 Discussion and Findings:

3.1 In their writ application filed, the Appellant contended that they were in fulfilment of all the conditions stipulated under Section 16(2) of the CGST Act, 2017. Further, tax corresponding to the services procured from the supplier of services was also duly paid along with the value of supply of services within the timeframe laid down under the Act. The conditions for availment of ITC prescribed under Section 16(2) of the CGST Act, 2017 are enumerated as under: -

- (a) Possession of tax invoice or debit note issued by the supplier registered under this Act;
- (b) Receipt of goods or services or both;
- (c) Payment of tax to the government;
- (d) Filing of return under section 39.

Reliance was also placed on the decision of the Apex Court in the case of ***Union of India (UOI) Vs Bharti Airtel Ltd. and Others [2021 (11) TMI 109 - SUPREME COURT]***.

3.2 Further, reference was also made to ***Press Release issued by the Central Board of Indirect Taxes and Customs (hereinafter abbreviated as 'CBIC') dated 18th October, 2018*** wherein it was stated that furnishing of outward supplies in Form GSTR-1 by the corresponding suppliers and the facility to view the same in Form GSTR-2A by the recipient is only in the nature of trade facilitation which does not impact the ability of taxpayer to avail ITC on self-assessment basis and in accordance with the provisions of Section 16 of the CGST Act, 2017.

In addition, ***Press Release issued by the CBIC dated 4th May, 2018*** duly clarified that there shall not be any automatic reversal of ITC from buyer on non-payment of taxes by the supplier. In case of default in payment of taxes by the supplier, recovery shall first be initiated against the said supplier and recovery of credit from the recipient shall only be made in exceptional circumstances, for instance; missing supplier, closure of business by supplier, supplier being declared as an insolvent or not having sufficient assets to discharge the liability etc.

3.3 Reliance was also placed on the decision rendered by the ***Hon'ble Delhi High Court*** in the case of ***Arise India Limited and Ors. Versus Commissioner of Trade and Taxes, Delhi and Ors*** which was affirmed by the ***Hon'ble Supreme Court*** of India [2018 (1) TMI 555 - SC ORDER] concluding that the default committed by the selling dealer cannot lead to denial of ITC to the purchasing dealer. It was held that in case of default on the part of selling dealer to deposit tax collected to the government treasury, proceedings should be initiated against the defaulting selling dealer and not against the bona fide purchasing dealer for denial of credit.

3.4 Upon judicious consideration of the submissions of the appellant, the available facts and material on record as well as the press releases issued by the CBIC, and applying the ratio decidendi of the cited judicial precedents, the ***Hon'ble Calcutta High Court*** held that the action of the department to ignore the tax invoices produced by the Appellant along with bank statement to substantiate payment of taxes to the supplier of services without resorting to any action against the supplier of services is nothing but arbitrary.

Moreover, the possession of tax invoice by the appellant and being in receipt of services is nowhere questioned or disputed by the adjudicating authority. In case the adjudicating

authority is able to bring out the exceptional case of the supplier of services being missing, closure of business of the supplier, supplier not having adequate assets or a case of abetment between the appellant and the supplier, only then the adjudicating authority shall stand justified in directing the appellant to reverse ITC availed by them. Therefore, the demand raised on the appellant was set aside and the appeal was allowed.

4.0 RSM Comments:

- 4.1 After introduction of Section 16(2)(aa) of the CGST Act, 2017 w.e.f. 01st January, 2022, additional condition for availment of ITC have been inserted wherein it is necessitated that the details of the invoice or debit note has been furnished by the supplier in their statement of outward supplies (i.e. Form GSTR-1) and that such details have been communicated to the recipient in auto-populated report made available in Form GSTR-2B on the common portal. It is pertinent to mention that the above-mentioned condition has been made applicable prospectively w.e.f. 1st January 2022 and thus is not applicable for the period prior to the effective date.
- 4.2 Furthermore, interim relief measures have been also provided by the CBIC by issuing clarification vide **Circular No. 183/15/2022-GST dated 27th December 2022** to deal with the differences in ITC availed in GSTR-3B as compared to that detailed in Form GSTR-2A for financial years 2017-18 and 2018-19.

It has been clarified that where difference between the ITC claimed in Form GSTR-3B and that available in Form GSTR-2A in respect of a supplier for a financial year exceeds INR 5 Lakhs, the proper officer shall ask registered person to produce a Certificate for the concerned supplier from the Chartered Accountant or the Cost and Management Accountant certifying that tax on such supplies has been paid by the supplier in their return in Form GSTR-3B. However, in cases where the difference between the ITC claimed in Form GSTR-3B and that available in Form GSTR-2A in respect of a supplier for the said financial year is up to INR 5 Lakhs, the proper officer shall ask a declaration from the concerned supplier to the effect that tax on such supplies has been paid by the supplier in their return in Form GSTR-3B.

- 4.3 With a view to further extend the benefits, CBIC issued another **Circular No. 193/05/2023-GST dated 17th July 2023** clarifying the manner of dealing with difference in ITC availed in Form GSTR 3B as against amounts reflecting in Form GSTR 2A for the period 01 April 2019 to 31 December 2021 and the manner and extent of applicability of earlier **Circular No. 183/15/2022** to period 01 April 2019 to 31 December 2021 has been clarified through the said circular.
- 4.4 We also refer to the judgement by the **Hon'ble Calcutta High Court in the case of M/s LGW Industries Limited [2021 (12) TMI 834]** wherein upon finding that all the purchases and transactions in question were genuine and executed before the cancellation of registration of those suppliers, also supported by valid tax-paying documents, it was held that the petitioner shall be given the benefit of input tax credit in question.
- 4.5 In the judgment of **M/s Tarapore & Company, Jamshedpur, the Hon'ble Jharkhand High Court [2020 (1) TMI 414]** held that on being satisfied as to the bona fides on part of the petitioner, no punitive action was required to be taken, or warranted against the petitioner.

Any punitive action is warranted only against the defaulting dealer, and not against the dealer acting in bona fide manner. It was the selling dealer, which had defaulted in filing its return or depositing the tax collected from the petitioner in the Government Treasury, how the punitive action could be taken against the petitioner firm, only for the reason that the JVAT Act provided for such action against both the dealers.

The order denying ITC and imposing interest upon the petitioner was thus quashed and further a direction was issued to refund to the petitioner the amount realized from them by way of garnishee order.

- 4.6 Reference is also made to the judgement pronounced by the **Hon'ble Madras High Court in the case of M/S. D.Y. Beathel Enterprises Vs The State Tax Officer (Data Cell), (Investigation Wing) Commercial Tax Buildings, Tirunelveli [2021 (3) TMI 1020]** wherein it was held that where it has been made certain that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against the seller. The respondent not taking any recovery action against the seller was condemned by the Hon'ble Madras High Court while rendering their decision. A similar judgement in favour of the assessee was pronounced by the **Hon'ble Madras High Court in the case of Sri Vinaya Agencies [2021 (2) TMI 1037]**
- 4.7 Although there are several judicial pronouncements by various High Courts in the captioned subject matter, however, the issue remains unresolved in view of contrasting interpretation of conditions of Section 16 of the CGST Act, 2017 by the tax authorities and the assesses.
- 4.8 The concern also lies in the applicability of the analogy of the decision rendered by Calcutta High Court post 1st January, 2022 when there is an explicit provision in Section 16(2)(aa) of the CGST Act, 2017 regarding admissibility of ITC only when the invoices or debit notes are reflected in GSTR-2B of the recipient. The fulfillment of the condition is dependent on furnishing of outward supplies by the supplier in Form GSTR-1 on which the recipient has no control.

In this context, the condition of section 16(2)(c) for availment of ITC on payment of taxes to the government is also similar in nature as it is not possible for the supplier to ensure that the taxes collected from them are paid to the government exchequer. It is worth mentioning that the constitutional validity of the provision contained in section 16(2)(c) of the CGST Act has been challenged before **Delhi High Court in the case of Bharti Telemedia Vs Union of India [W.P. No. 6293 of 2019]**.

Likewise, validity of the provision contained in Section 16(2)(aa) of the CGST Act, 2017 has also been challenged before **Delhi High Court in the case of NKG & Associates [W.P. No. 5908/2023]** and **Gauhati High Court in the case of McLeod Russel India Limited [W.P. No. 5725/2022]** on the premise that recipient cannot be penalized for the defaults committed by the suppliers. The assesses are hopeful of more favourable pronouncements by the superior courts so that the dispute and litigation can come to a permanent rest.

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This Newsflash summarizes the judgement of Hon'ble Calcutta High Court on denial of ITC for non-reflection of invoices in GSTR-2A without investigating the supplier. It may be noted that nothing contained in this newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the said judgement and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this newsflash.

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