

Neutral Citation No. - 2023:AHC:201260

Reserved

Court No. - 5

Case :- WRIT TAX No. - 1237 of 2021

Petitioner :- M/S Malik Traders

Respondent :- State Of U.P. And 2 Others

Counsel for Petitioner :- Pradeep Kumar Srivastava, Pavan Kumar
Srivastava

Counsel for Respondent :- C.S.C.

HON'BLE PIYUSH AGRAWAL, J.

1. Heard Mr. Pradeep Kumar Srivastava for the petitioner and Mr. Rishi Kumar, learned Additional Chief Standing Counsel for the respondents.
2. The instant Writ Tax is being entertained by this Court in view of the fact that G.S.T. Tribunal is not functional in the State of Uttar Pradesh pursuant to the Gazette notification of the Central Government bearing number CG-DL-E-14092023-248743 dated 14.09.2023.
3. By means of this writ petition, the petitioner is assailing the order dated 4.10.2019 passed by the Commercial Tax Officer, Sector 2 Meerut by which the proceedings of Section 74 of UP GST Act was initiated demanding Rs. 12,32,148/- as wrong availment of input tax credit which was confirmed by the impugned order dated 6.3.2021 passed by Additional Commissioner, Grade – 2 (Appeal) First, Commercial Tax, Meerut.
4. Brief facts of the case as stated, are that the petitioner being a registered dealer having GSTIN No. 09ACLP9404D1ZA is engaged in the purchase and sale of waste materials, plastic scrap, paper scrap and metal scrap. The petitioner from April 2018 to September 2019 has disclosed the turnover of Rs. 34,22,634/- on which input tax credit of Rs. 6,16,074.12/- was availed. Thereafter a show cause notice was issued on 23.1.2019 under Section 74 of UP GST Act on the ground of wrong availment of input tax credit to which a reply was submitted by the petitioner. Being not satisfied

with the reply of the petitioner, tax liability to the tune of Rs. 6,16,074/- along with penalty of Rs. 6,16,074/- total amount Rs. 12,32,148/- was demanded from the petitioner by the order dated 4.10.2019. Thereafter an appeal has been preferred which has been rejected by the impugned order dated 6.3.2021. Hence the present writ petition.

5. Learned counsel for the petitioner has submitted that petitioner has purchased the goods / scrap from various parties through tax invoices for which e-way bills were also generated. The said goods were transported through trucks along with bilties and payments were made through cheques or RTGS / NEFT. On the basis of selling dealer having not shown the said purchases in its return or not deposited tax, the action cannot be taken against the petitioner. He further submitted that if the selling dealer have not paid the tax / deposited the tax with the Government, the benefit of input tax credit cannot be denied to the petitioner.

6. It was argued that the benefit of tax credit in the G.S.T. regime is being brought with intention to avoid cascading effect and once the tax has been charged on the bill and paid by the petitioner through banking channel, the benefit of input tax credit cannot be denied, legally. He submitted that petitioner has rightly discharged its tax liability by paying the tax charged on the bills raised by the selling dealer and if the selling dealer have not deposited the tax so charged from the petitioner, the selling dealer shall be penalized and not the petitioner. It has been further argued by the petitioner that in the event the amount of input tax credit claimed by the petitioner is being recovered that would amount to double taxation, which is not the spirit of G.S.T. regime.

7. In support of his claim, learned counsel for the petitioner has relied upon the judgement of this Court in **Ashish Trading Company Vs. State of UP, Writ (Tax No. 228 of 2021) 2023 (113) UPTC 6** and Calcutta High Court in **M/s LGW Industries Limited and others Vs. Union of India and others** (WPA No. 23512 of 2019) decided on 13.12.2021 as well as **Sanchita Kundu and another Vs. Assistant Commissioner of State Tax and others** (WPA No. **7231 of 2022 dated 5.5.2022) 2022 (111) UPTC 1268** and prays for allowing the writ petition or in alternative remanding the same for re-consideration of the

claim of the petitioner.

8. *Per contra*, Mr. Rishi Kumar, learned A.C.S.C. has supported the impugned orders and submitted that under Section 16 of UP GST Act it has been provided that input tax credit can be availed with certain conditions stipulated therein, in the event of non-fulfilment of such conditions as enumerated therein, the benefit of input tax credit cannot be accorded. He further submitted that without actual physical movement of goods or genuineness of transaction, the input tax credit cannot be availed. He further submitted that for availment of input tax credit, the petitioner is duty bound to prove beyond any reasonable doubt and establish that actual transaction took place and merely furnishing the details of tax invoices, e-way bills, GR is not sufficient. The petitioner was required to give details i.e. vehicle number which were used for transportation of goods, payment of freight charged, acknowledgement of taking delivery of goods and payment etc. He further submitted that petitioner was required to prove and establish beyond doubt the actual physical movement of goods and genuineness of transportation by furnishing details as referred above and in the event such details are not being furnished, the benefit of input tax credit cannot be accorded.

9. In support of his submissions, he has relied upon the judgement of Hon'ble the Apex Court in the case of **State of Karnataka Vs. M/s Ecom Gill Coffee Trading Private Limited (Civil Appeal No. 230 of 2023, decided on 13.03.2023)** as well as Patna High Court in **M/s Aastha Enterprises Vs. State of Bihar (Civil Writ Jurisdiction Case No. 10395 of 2023)** decided on 18.8.2023 in which it has been held that the burden to prove the actual physical movement of the goods is upon the purchasing dealer for availment of input tax credit. He further relied upon the judgement of this Court in **Commissioner Commercial Tax Vs. M/s Ramway Foods Ltd (Sales / Trade Tax Revision No. 26 of 2023)** decided on 23.8.2023 and prays for dismissal of the writ petition.

10. After hearing learned counsel for the petitioner, the Court has perused the records.

11. Admittedly, the concept of input tax credit has been introduced in the tax regime prior to G.S.T. which is being followed in the current regime also. The scheme of input tax credit is being introduced with an object to avoid cascading effect of tax. The purchasing dealer can avail the input tax credit on tax paid on its purchase whereas manufacturer can avail the same on purchase of its raw material used for manufacturing or selling of its final product which will avoid double taxation. The benefit of concession / I.T.C. under the tax statute can be availed only on fulfilment of certain conditions or restrictions as stipulated under the Act. In the event of breach of any of the conditions as enumerated under the Act, no benefit can be conferred to the dealer.

12. Before proceeding further, it will be appropriate to extract the relevant provision of U.P. G.S.T. Act :-

Section 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;

[(aa) the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;]⁴⁰

(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 or, as the case may be, services-
(i) 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;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.]⁴¹;

(c) subject to the provisions of [section 41 or section 43A]⁴², 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 installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment:

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 (Act No. 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 [Omitted]⁴³ debit note pertains or furnishing of the relevant annual return, whichever is earlier.

[PROVIDED that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.]”

On perusal of the aforesaid section, it is clear that every registered dealer can claim the benefit of input tax credit only on fulfilment of certain conditions as enumerated under the Act. Section 16 (2) further provides that no registered dealer 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 mentioned therein is fulfilled. In other words, Section 16 specifically provides the registered dealer to fulfil the conditions as provided therein for availment of input tax credit.

13. Further Section 74 of UP GST Act is extracted hereunder:-

Section 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 subsection (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 subsection (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 subsection (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 subsection (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 there under.

(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 subsection (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.

On perusal of said section, it is clear that 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 empowers to issue notice that tax has not been paid or short paid or erroneously refunded or input tax credit has wrongly been availed or utilized by any reason or wilful misstatement or suppression of fact. Upon adjudication the assessee is required 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.

14. Thus on brief reading of the aforesaid two sections, it is evident that in the event of wrong availment of input tax credit, the proceedings can be initiated against the registered person or registered dealer but at the same time, restrictions has been imposed upon the authorities that without putting notice to the dealer, no adjudication proceeding can be initiated.

15. In the case in hand, the petitioner has only brought on record the tax invoices, e-way bills, GR and payment through banking channel, but no such details such as payment of freight charges, acknowledgement of taking delivery of goods, toll receipts and payment thereof has been provided. Thus in the absence of these documents, the actual physical movement of goods and genuineness of transportation as well as transaction cannot be established and in such circumstances, further no proof of filing of GSTR 2 A has been brought on record, the proceeding has rightly been initiated against the petitioner.

16. The Apex Court in the case of **State of Karnataka Vs. M/s Ecom Gill Coffee Trading Private Limited (Civil Appeal No. 230 of 2023, decided on**

13.03.2023), while considering the *pari materia* of section 70 of the Karnataka Value Added Tax Act, 2003, where the burden was upon the dealer to prove beyond doubt its claim of exemption and deduction of ITC, has observed as under:

9.1 Thus, the provisions of Section 70, quoted hereinabove, in its plain terms clearly stipulate that the burden of proving that the ITC claim is correct lies upon the purchasing dealer claiming such ITC. Burden of proof that the ITC claim is correct is squarely upon the assessee who has to discharge the said burden. Merely because the dealer claiming such ITC claims that he is a bona fide purchaser is not enough and sufficient. The burden of proving the correctness of ITC remains upon the dealer claiming such ITC. Such a burden of proof cannot get shifted on the revenue. Mere production of the invoices or the payment made by cheques is not enough and cannot be said to be discharging the burden of proof cast under section 70 of the KVAT Act, 2003. The dealer claiming ITC has to prove beyond doubt the actual transaction which can be proved by furnishing the name and address of the selling dealer, details of the vehicle which has delivered the goods, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. The aforesaid information would be in addition to tax invoices, particulars of payment etc. In fact, if a dealer claims Input Tax Credit on purchases, such dealer/purchaser shall have to prove and establish the actual physical movement of goods, genuineness of transactions by furnishing the details referred above and mere production of tax invoices would not be sufficient to claim ITC. In fact, the genuineness of the transaction has to be proved as the burden to prove the genuineness of transaction as per section 70 of the KVAT Act, 2003 would be upon the purchasing dealer. At the cost of repetition, it is observed and held that mere production of the invoices and/or payment by cheque is not sufficient and cannot be said to be proving the burden as per section 70 of the Act, 2003.

In the said judgement Hon'ble the Apex Court has held that primarily burden of proof for claiming the input tax credit is upon the dealer to furnish the details of selling dealer, vehicle number, payment of freight charges, acknowledgement of taking delivery of goods, tax invoices and payment particulars etc. to prove and establish the actual physical movement of the goods. Further by submitting tax invoice, e-way bill, GR or payment details is not sufficient.

17. Patna High Court in the case of **M/s Astha Enterprises (supra)** has held as under :-

“9. 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 selling dealer, details of the vehicle delivering the goods, payment of freight charges, acknowledgement 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 and genuineness of transactions, by furnishing the details referred to above and mere production of tax invoices would not be sufficient to claim ITC.”

18. Similarly, this Court in the case of the **Commissioner Commercial Tax Vs. M/s Ramway Foods Ltd. (supra)** has held that the primary responsibility of claiming the benefit is upon the dealer to prove and establish the actual physical movement of goods, genuineness of transactions, etc. and if the dealer fails to prove the actual physical movement of goods, the benefit cannot be granted.

19. The judgement relied upon by the counsel for the petitioner of Calcutta High Court in the cases of **M/s LGW Industries Limited and others (supra)** and **Sanchita Kundu and another (supra)** is of no aid to the petitioner as recently Hon’ble the Apex Court in the case of **M/s Ecom Gill Coffee Trading Private Limited (supra)** has specifically held that onus is to be discharged by the petitioner to prove and establish beyond doubt the actual transaction and physical movement of goods. But in the case in hand, the petitioner has failed to prove and establish actual physical movement of goods and genuineness of transaction as such the proceedings has rightly been initiated.

20. Further, the case law relied upon by the counsel for the petitioner of this Court in **Ashish Trading Company (supra)** is also of no aid to the petitioner as in that case in para 14, the Court has recorded a finding of fact that order of the first appellate authority is cryptic as no details were provided. But the facts of the present case is different as stated in previous paras and recent judgement of Apex Court in the case of **Ecom Gill Coffee Trading Pvt. Ltd. (supra)** is squarely applicable in the facts of the present case.

21. In view of the facts as stated above, no interference is called for by this Court in the impugned orders. The writ petition fails and is **dismissed** accordingly.

Order Date :- 18.10.2023
Rahul Dwivedi/-