

(2023) 12 CAL CK 0044
In the Calcutta High Court

Case No : MAT No. 1099 Of 2023, (I.A. NO. CAN 1 Of 2023)

M/S. Bba Infrastructure Limited

APPELLANT

Vs

Senior Joint Commissioner Of State Tax And Others

RESPONDENT

Date of Decision : 13-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 300A
Central Goods and Services Tax Act, 2017 — Section 16(1), 16(2), 16(2)(d), 16(3), 16(4), 39, 47, 107
Tamil Nadu Value Added Tax Act, 2006 — Section 3(2), 3(3), 19, 19(2), 19(11), 19(20)
Central Sales Tax Act, 1956 — Section 8(4)
Madras General Sales Tax Act, 1959 — Section 7A
Andhra Pradesh General Sales Tax, 2017 — Section 16(4)
Bihar Goods and Services Taxes Act, 2017 — Section 16(4)

Citation : (2023) 12 CAL CK 0044

Hon'ble Judges : T.S. Sivagnanam, CJ;Hiranmay Bhattacharyya, J

Bench : Division Bench

Advocate : Vinay Shraff, Priya Sarah Paul, T.M. Siddiqui, T. Chakraborty, S. Sanyal

Final Decision : Dismissed

Judgement

1. This intra court appeal filed by the writ petitioner is directed against the order dated 13.06.2023 in WPA 11339 of 2023. By the said order, the learned Single Bench held that there is no scope for passing any interim order and issue involved in the writ petition requires affidavit from the respondent for final adjudication. Accordingly, the respondents were directed to file their affidavit-in-opposition within a time frame and the writ petition as directed to be listed for hearing.

2. Mr. Vinay Shraff, learned Advocate appearing for the appellant submitted that though this appeal is against an order refusing to grant interim orders, requested this Court to hear the writ petition as well as questions of law are involved in the writ petition and may not even require an affidavit to be filed by the respondent.

Mr. T.M. Siddiqui, learned Additional Government Pleader appearing for the respondent submitted that one opportunity may be granted to the respondents to file their affidavit-in-opposition which request was granted by order dated 23.06.2023 and after the affidavit-in-opposition was filed by the respondent, the appeal as well as the writ petition were heard and are now disposed of by this common judgment and order.

3. The appellant filed the writ petition challenging an order-in-appeal dated 04.01.2023 and sought for a consequential direction upon the respondent to refund the tax amounting to Rs.28,63,680/- which is alleged to have been recovered by the appellant in excess of 10% of disputed tax amount and to prohibit the respondents from taking further cohesive action against the appellant. The order impugned in the writ petition was passed under Section 107 of the Central Goods and Services Tax Act, 2017 and West Bengal Goods and Services Tax Act, 2017 (hereinafter referred as the GST Act) whereby the Input Tax Credit availed by the appellant amounting to Rs. 28,65,780/- from the period from November, 2018 to March 2019 was denied on the ground that the returns for the said period was filed beyond the statutory time limit stipulated in Section 16(4) of the GST Act, which time limit expired on 20.10.2019.

4. Facts leading to the filing of the writ petition are that a show-cause notice dated 28.10.2020 was issued to the appellant calling upon the appellant to explain as to why Input Tax Credit amounting to Rs. 28,64,780/- for the period from November, 2018 to March, 2019 should not be denied as returns for the FY 2018-19 were filed beyond the statutory time limit that is 29.10.2019. The appellant by a representation dated 25.11.2020 requested for extension of time. On 04.01.2021 the second respondent passed an order directing the appellant to pay tax, penalty and interest on the ground that the statute has set down a time frame within which a taxable registered person can claim ITC. The appellant appears to have not paid the tax, penalty and interest as demanded and reminder was sent by the department on 06.09.2021 to deposit the entire dues on or before 10.09.2021. The appellant did not comply with the demand and consequently the department on 11.09.2021 debited the amount from the electronic cash ledger/ credit ledger of the appellant. The appellant filed an appeal before the statutory appellate authority. On 07.05.2022 the appellant was intimated by the office of the appellate authority that they have not deposited any pre-deposit amount on the disputed demand of tax. The appellant sent a reply on 01.06.2022 stating that the officer in-charge had initiated recovery proceedings and debited a sum of Rs. 11,62,099/- from the CGST Credit ledger and Rs. 11,34,291/- from the SGST credit ledger along with the interest from each cash ledger balances. The first respondent, the appellant authority by order dated 04.01.2023 confirmed the order passed by the second respondent holding that the statute has set a time frame within which the appellant can avail and utilize input tax credit and the appellant having done so beyond the time limit i.e. 20.10.2019 is not entitled for the ITC.

5. We have elaborately heard Mr. Vinay Shraff, learned Advocate appearing for the appellant assisted by Ms. Priya Sarah Paul, learned advocate for the appellant and Mr. T.M. Siddiqui, learned Additional Government Pleader assisted by Mr. T. Chakraborty and Mr. S Sanyal for the respondent department.

6. The appellant's case is that they had submitted the returns in GSTR-3B for the period from November, 2018 to March, 2019 on 20.10.2019 which is admittedly beyond the due date of submission of the return for the month of September, 2019. The department's contention is that the returns having been filed beyond the statutory time limit the appellant becomes ineligible for Input Tax Credit and consequently he has to reverse the credit taken and having willfully mis-stated the particulars and availed the benefit they are liable to pay penalty. The contention of the appellant is that Input Tax Credit is not taken through the return but it is taken through the books of account immediately on receipt of goods and services in terms of first proviso to Section 16(2) of the GST Act. Therefore, it is submitted that the time limit under Section 16(4) cannot supersede or override the scheme of the statute as operation of Section 16(4) makes the non-obstante provision namely Section 16(2) meaningless. In other words, it is contended that Section 16(2) has overriding effect on Section 16(4) as is evident from the words used in the statute, "entitled to take credit". Thus, it is contended entitlement of a particular right after fulfilling the prescribed and specified conditions results into a right, "taking" or "availing" or "utilizing" that right through procedural formalities or furnishing a return by the person who is entitled to that right is a matter of his choice. Further, it is the case of the appellant that in Section 16(1) of the GST Act, there is no mention of any time limit or time element and there is no visible linkage of Sub-section (1) with Sub-section (4) of Section 16. The learned Advocate for the appellant elaborately referred to the minutes of the 18th GST Council meeting held on 30th June, 2017 with particular reference to the type of returns to be filed etc. Reliance was placed on the decision of the Hon'ble Supreme Court in Union of India Versus Bharti Airtel Ltd. 2021 (131) Taxmann.com 319 (SC) Reference was also made to the notification issued by the Government in Notification No. 12 of 2019-CT dated 07.03.2019 and Notification No. 76/2018-CT dated 31.12.2018 which pertained to the time limit for filing the monthly return from April, 2019 to June, 2019 which was extended and with regard to period from July, 2017 to September, 2019 wherein the late fee payable under Section 47 of the Act was waived. With regard to the extreme hardship which will be faced by the dealer/ assessee a reference was made to the decision in the case of Indsur Global Ltd. Versus. Union of India 2014 (310) ELT 833 (Guj).

7. The respondents seek to sustain the orders passed by the authorities contending that the statute should be interpreted in the light of the entire text and exception clauses or non-obstante clauses should not be interpreted in isolation from the main enacting provision. It is submitted that the purpose of non-obstante clause must be ascertained with which the legislature has inserted it. Non-obstante clause is employed to give overriding effect to some contrary

provision but not complementary provision. It is enacted to give the enacting part of the section in case of conflict and overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. The language of Section 16 is clear that the non-obstante clause in Section 16(2) does not in any manner limit the operation of Section 16(3) or Section 16(4) and they are not contradicting, rather they all being to restrict the provisions, are basically complementing each other and are limiting the scope and operation of Section 16(4). Further, it is submitted that the legislative intent is not to make Section 16(4) otiose by applying Section 16(2) of the Act. Conjoint reading of Section 16(2)(d) and Section 16(4) make it clear that the entitlement to the credit of any Input Tax in respect of any supply of goods or services or both arises after filing of return under Section 39 of the Act. This condition is further qualified by imposing a time limit under Section 16(4). Admittedly, in the case of the appellant the returns were filed well beyond the period stipulated under Section 16(4). The imposition of penalty was well justified as the appellant had committed fraud by making a false and dishonest representation in GSTR-3B return for the aforementioned period and claimed ineligible ITC and thereby reducing the net tax liability.

8. This being a fraudulent claim, penalty is liable to be imposed and rightly imposed. In support of his contention, learned Additional Government Pleader placed reliance on the decision in *The State of Tamil Nadu Versus M.K. Kandaswami and Others* (1975) 4 SCC 745 ALD *Automotive Private Limited* (2019) 13 SCC 225 TVS Motor Company Limited Versus State of Tamil Nadu and Others (2019) 13 SCC 403. The decision of the High Court of Andhra Pradesh in *Thirumalakonda Plywoods Versus The Assistant Commissioner- State Tax WP 24235 of 2022* dated 18.07.2023 and the decision of the High Court of Judicature at Patna in *Gobinda Construction Versus Union of India and others in Civil Writ Jurisdiction Case No. 9108 of 2021* dated 08.09.2021.

9. The Hon'ble Supreme Court in *ALD Automotive Private Limited* while considering a challenge to Section 19(11) of the Tamil Nadu Value Added Tax Act, 2006 requiring the claim for Input Tax Credit to be made within 90 days from the date of purchase or before the end of the financial year whichever is later as being ultra vires to a statutory claim of the Act, considered as to the principles for interpreting law dealing with economic activities. While doing so, the Hon'ble Supreme Court referred to the decision of the Constitution Bench in *R.K. Garg and Others Versus Union of India and Others* (1981) 4 SCC 675 wherein it was held that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It was further held that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any Doctrinaire or straight jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, larger play has to be allowed to the legislature. Further it was held that the court should feel more inclined to

give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. The Hon'ble Supreme Court referred to the decision in *Kailash Chandra Versus Mukundi Lal* (2002) 2 SCC 678 wherein the Hon'ble Supreme Court held that a provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself more particularly, when the subject matter dealt with in difference sections or parts of the same statute is the same or similar in nature. After pointing out about how a taxation statute has to be interpreted, the Hon'ble Supreme Court proceeded to examine the provisions of the concern statute and held that input tax credit is in the nature of benefit/concession extended to the dealers under the statutory scheme. The concession can be received by the beneficiary only as per the scheme of the statute. Reference was made to the decision in *Godrej and Boyce Manufacturing Company Private Limited Versus CST* (1992) 3 SCC 624 wherein the court held that the rule making authority can provide curtailment while extending a concession. Reference was made to the decision in *India Agencies Versus CCT* (2005) 2 SCC 129 wherein it was held that when the rules prescribes the procedure to be followed and the documents to be produced for claiming concessional rate of tax under Section 8(4) of the Central Sales Tax Act, the dealer has to strictly follow the procedure and produce a relevant material required under the rule. Reference was also made to the decision in the case of *State of Karnataka Versus M.K. Agro Tech Private Limited* (2017) 16 SCC 210 wherein the Hon'ble Supreme Court held that it is a settled proposition of law that taxing statutes are to be interpreted literally and further it is the domain of the legislature as to how much tax credit is to given under what circumstances. Reference was made to the decision in *Jayam and Company Versus Assistant Commissioner and Another* (2016) 15 SCC 125 wherein the court held that whenever concession is given by the statute, the conditions thereof are to be strictly complied with in order to avail such concession. Ultimately the Hon'ble Supreme Court upheld the validity of the Section 19(11) of the said act in the following terms:-

38. This Court further held that it is a trite law that whenever concession is given by a statute the conditions thereof are to be strictly complied with in order to avail such concession. In paragraph 12, following has been laid down:

12. It is a trite law that whenever concession is given by statute or notification, etc. the conditions thereof are to be strictly complied with in order to avail such concession. Thus, it is not the right of the "dealers" to get the benefit of ITC but it is a concession granted by virtue of Section 19. As a fortiori, conditions specified in Section 10 must be fulfilled. In that hue, we find that Section 10 makes original tax invoice relevant for the purpose of claiming tax. Therefore, under the scheme of the VAT Act, it is not permissible for the dealers to argue that the price as indicated in the tax invoice should not have been taken into consideration but the net purchase price after discount is to be the basis. If we were dealing with any other aspect dehors the issue of ITC as per Section 19 of the VAT Act, possibly the arguments of Mr. Bagaria would have assumed some

relevance. But, keeping in view the scope of the issue, such a plea is not admissible having regard to the plain language of Sections of the VAT Act, read along with other provisions of the said Act as referred to above.

37. The Constitutional validity of Section 19(20) was upheld. The above decision is a clear authority with proposition that Input Tax Credit is admissible only as per conditions enumerated Under Section 19 of the Tamil Nadu Value Added Tax Act, 2006. The interpretation put up by this Court on Section 3(2) and 3(3) and Section 19(2) is fully attracted while considering the same provisions of Section 3(2) and 3(3) and provision of Section 19(11) of the Act. The Statutory scheme delineated by Section 19(11) neither can be said to be arbitrary nor can be said to violate the right guaranteed to the dealer Under Article 19(1) (g) of the Constitution. We thus do not find any infirmity in the judgment of the High Court upholding the validity of Section 19(11) of the Act. Both the issues are answered accordingly.

10. In the ALD Automotive Private Limited an alternate submission was made on behalf of the assessee that Section 19(11) of the Tamil Nadu Value Added Tax Act cannot be held to be mandatory and it is only a directory provision non-compliance with which cannot be a ground of denial of Input Tax Credit to the appellant therein. After noting the conditions enumerated in Section 19 of the said Act, it was held that the conditions under which the concession and benefit is given is always to be strictly construed and if the contention that there is no time period for claiming Input Tax Credit is accepted, the provision becomes too flexible and gives rise to a large number of difficulties including difficulty in verification of claim of Input Tax Credit. Further it was held that the taxing statutes contain self-contained scheme of levy, computation and collection of taxes. The time under which a return is to be filed for the purpose of assessment of tax cannot be dependent on the will of a dealer. Ultimately it was held that the time period prescribed under Section 19(11) of the Tamil Nadu Value Added Tax Act was mandatory. The Court also considered the correctness of the argument that when an assessee has a valid explanation for claiming Input Tax Credit within the time limit the authority has jurisdiction to extent a time. This argument was rejected holding that the authority has no power under the Act to dilute the mandatory requirement of the law and the taxing statute has to strictly construed, nothing is to be read in, nothing is to be implied and the language used in the taxing statute had to be looked into fairly. While on this issue, it will be beneficial to refer to the decision in the case of *The State of Tamil Nadu Versus M.K. Kandaswami and Others* (1975) 4 SCC 745 wherein the question which fell for consideration was with regard to the scope of Section 7A of the Madras General Sales Tax Act, 1959 and the Hon'ble Supreme Court held that it has to be remembered that Section 7A of the said Act is at once a charging as well as remedial provision. It's main object is to plug leakage and prevent evasion of tax. In interpreting such a provision a construction which would defeat its purpose and/or obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability and

efficacy is to be preferred to the one which would render it otiose or sterile.

11. The Hon'ble Supreme Court in TVS Motor Company Limited after taking note of the decision in ALD Automotive held that ITC is a form of concession which is provided by the Act; it cannot be claimed as a matter of right but only in terms of the provision of the statute; therefore the conditions mentioned had to be fulfilled by the dealer. Very recently, the Hon'ble Division Bench of the High Court of Andhra Pradesh had considered an identical case as that of the case on hand, wherein a *pari materia* provision under the Andhra Pradesh General Sales Tax, 2017 namely Section 16(4) of the Act was considered in a challenge to its validity on the ground that it violates Article 14, 19(1)(g), and 300A of the Constitution of India; whether the non-obstante clause in Section 16(2) of the APGST, CGST Act, 2017 would prevail Section 16(4) of the APGST/CGST Act, 2017.

12. The argument advanced before us by the learned Advocate for the appellant were identical to that of the arguments which were placed by the petitioners/ assessee in the said case and the same was rejected, in our view rightly on the ground that Section 16(2) prescribes, the eligibility criteria which is mandatory and in the absence of fulfillment of the eligibility criteria the dealer will not be entitled to claim ITC. We are in the respectful agreement with the view expressed. The contention that non obstante clause in the Sub Section(2) of Section 16 overrides the other provisions namely Section 16(4) was canvassed before the court which was also rightly rejected after taking note of the various decisions as to how the non obstante clause should be interpreted and rightly held that Section 16(2) does not appear to be a provision which allows Input Tax Credit, rather Section 16(1) is the enabling provision and Section 16(2) restricts the credit which is otherwise allowed to the dealers who satisfied the condition prescribed the interpretation given by the court that the stipulation in Section 16(2) is the restrictive provision is the correct interpretation given to the said provision. A similar challenge was made to Section 16(4) of the Bihar Goods and Services Taxes Act, 2017 in the case of a Gobinda Construction wherein the court held that in the language of Section 16 does not suffer from any ambiguity and clearly stipulates grants of ITC subject to the condition and restriction put therein. Further it was held that the right of registered person to take ITC under Section 16(1) becomes a vested right only if the conditions to take it are fulfilled, free of restriction prescribe under Sub Section (2) thereof. Further the court held that the provision under Sub Section (4) of Section 16 is one of the conditions which makes a registered person entitled to ITC and by no means Sub Section (4) can be said to be violative of Article 300A of the Constitution of India. The court noted the decision in ALD Automotive Private Limited, Godrej and Boyce Manufacturing Private Limited and Jayam and Company and ultimately upheld the constitutional validity of Section 16(4) of the Act.

13. Thus, for all the above reasons, we find no ground to grant the relief sought for by the petitioner in the writ petition.

14. Consequently, the appeal as well as the writ petition are dismissed.

No costs.