IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2125 of 2019

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M/s Commercial Steel Engineering Corporation a partnership firm having it's business office at 13/1 Industrial Estate, Patliputra, Patna-800013 through it's authorized representative namely kumar Manglam, Male aged about 24 years son of Sanjay Kumar Khemka, resident of 3 B & C Savita Apartment, Alpana Market, Patliputra, P.S.-Patliputra, Patna-800013

... ... Petitioner

Versus

1. The State of Bihar through the Principal Secretary cum Commissioner, Department of Commercial Taxes, Govt. of Bihar, Patna
2. The Joint Commissioner of State Taxes Patliputra Circle, Patna
3. The Assistant Commissioner of State Taxes Patliputra Circle, Patna

... ... Respondents

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Appearance :
For the Petitioner/s : Mr. Gautam Kumar Kejriwal, Adv.
For the Respondent/s : Mr.Vikash Kumar, SC11

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 27-06-2019

The petitioner by filing this writ petition under Article 226 of the Constitution of India has made the following prayer:

> " a) For issuance of a writ in the nature of certiorari for quashing of the order dated 6.11.2018 passed by the respondent no.3 being illegal and without jurisdiction in terms of Section 73(1) of the Bihar Goods and Service Tax Act, 2017 (hereinafter referred to as the Act for short);
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> b) For issuance of a writ in the nature of mandamus directing the respondents specially the respondent no.3 for grant of transitional credit or adjustment of excess of input tax credit against future liabilities of

the petitioner for a sum of Rs.18,33,304.76 and Rs.20,79,256.00 which amount is lying with the respondent department in terms of order of assessment for the financial year 2007-08 and 2011-12.

(c) For holding and a declaration that once the respondent department is holding in hand the excess of input tax credit already standing to the credit of the petitioner the same has to be given adjustment against future liabilities and a denial of such adjustment would be an act giving rise to unjust enrichment and also would be violative of Article 265 of the Constitution of India.

(d) For restraining the respondents specially the respondent no.3 from taking any coercive action against the petitioner for recovery of the said demand as contained in the impugned order dated 6.11.2018."

When this matter is taken up for consideration Mr. Gautam Kejriwal, learned counsel appearing for the petitioner in reference to the supplementary affidavit filed on 12.2.2019 has submitted that he would be restricting the present writ petition to the relief prayed in paragraph 1(a) of the writ petition and in so far as the rejection by the statutory authority to the claim for refund of the surplus value added tax deposited by the petitioner for the period in question is concerned, the petitioner, as advised, would take recourse to the remedy as may be available to him in law.

Learned counsel thus submits that he would not pressing the relief as present in paragraph 1(b) and (c) to the writ petition.

Having considered the submissions so advanced by Mr. Kejriwal and while allowing the writ petitioner to pursue his remedy in so far as the issue of refund is concerned before the statutory authority, we allow the petitioner to press the writ petition in so far as relief 1(a) is concerned and which questions the order of respondent no.3, Assistant Commissioner of State Taxes, Patliputra Circle, Patna on its legality.

Bare facts essential for disposal of the writ petition which needs to be taken note of are as follows:

The petitioner is a partnership firm having its works at Bihta in the district of Patna. The petitioner is registered under the Bihar Value Added Tax Act, 2005 (hereinafter referred to as 'the VAT Act'), the Central Sales Tax Act, 1956 (hereinafter referred to as 'the CST Act') and the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale therein Act,1993 (hereinafter referred to as 'the Entry Tax Act').

The issue in contest relates to the financial year 2007-08 and 2011-12 for which the petitioner filed his returns under 'the VAT Act'. An assessment proceeding was held under section 31 of 'the VAT Act' and an assessment order was passed on 7.9.2010

showing an input tax credit of Rs.18,33,304.76 for the financial year 2007-08. However, since no input tax credit was to be allowed in respect of purchase of cartridge on which tax to the tune of Rs.112.00 was payable, hence direction was issued for deposit of tax on the said cartridge to the tune of Rs.112.52 by the Commercial Tax Officer, Patliputra Circle, Patna vide his order dated 7.9.2010 at Annexures 2 series.

In a similar manner, an assessment order was passed for the financial year 2011-12 on 27.8.2016 showing an input tax credit of Rs.20,79,256.00. However, on a default made by the petitioner on filing of annual returns that a penalty of Rs.5000/- was imposed for which the assessing authority i.e. the Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna directed for issuance of demand notice which is enclosed with the assessment order at Annexures 2 series. As indicated, the assessment orders so passed for the period in question i.e. 2007-08 and 2011-12 shows input tax credit admissible to the petitioner to the tune of Rs.18,33,304.76 and Rs.20,79,256.00 and has attained finality because it has not been appealed against.

According to the petitioner, though he was entitled to carry forward this input tax credit but due to inadvertent mistake of the Accountant, this was not reflected in the returns filed for the

subsequent years and it is only in 2017 that the mistake of unadjusted input tax credit of Rs.18,33,304.76 for the period 2007-08 and Rs.20,79,256.00 for the financial year 2011-12 was detected. A refund application in the statutory form was filed, copies of which is at Annexures 3 series and in so far as the refund application for the financial year 2007-08 is concerned, it has been rejected, inter alia, on grounds that it was time barred. Copy of the order dated 12.6.2017 is at Annexure 4.

Mr. Kejriwal has fairly submitted that the statement at paragraph-16 of the writ petition that, the petitioner has filed a writ petition to question such rejection, is a bonafide typographical error because the matter is pending before the Commissioner of Commercial Taxes and not the High Court. Mr. Kejriwal also informs that in so far as the refund application in relation to the financial year 2011-12 is concerned, the petitioner has no information as regarding its outcome.

According to the petitioner, in between this exercise the Goods and Services Tax Act, 2017 was enforced which came into effect from 1.7.2017. The petitioner filed an application in terms of Section 140 of the Bihar Goods and Services Tax Act, 2017 (hereinafter referred to as ‘the BGST Act’) to take credit of the surplus Value Added Tax and Entry Tax and to carry forward the

same in his electronic ledger in form TRAN-1 for the two years 2007-08 and 2011-12. According to the petitioner, the sum total of the credit for the period 2007-08 and 2011-12 comes to Rs.39,12,560.76 and which credit alongwith the credits earned by the petitioner for the subsequent period as until 1.7.2017 was reflected in the electronic credit ledger to read Rs.43,21,945.00.

It is admitted by the petitioner that as against this input tax credit reflected in the electronic ledger, though a sum of Rs.96,077/- was utilized but the same was remitted as manifest in the return filed for the month of August, 2018. It is also the case of the petitioner that since the tax liability for the month of October, 2018 was to the tune of Rs.1,14,237/- and the input tax credit for the said month came to Rs.59,103/-, the balance tax liability to the tune of Rs.55,134/- was deposited and reflected in the monthly return filed for the month of October, 2018 in November, 2018. Learned counsel in support of his submissions has enclosed extract of the electronic cash ledger at Annexure 9 to the rejoinder.

In so far as the application of the petitioner under section 140 of 'the BGST Act' is concerned, the same came to be rejected by the order impugned passed by respondent no.3, the Assistant Commissioner of State Taxes, Patliputra Circle, Patna, impugned at Annexure 8 to the writ petition and while rejecting

the same, the respondent no.3 has raised a demand on tax liability to the tune of Rs.42,73,869.00 on which transitional credit was allegedly claimed and by imposing interest at the rate of 18% for availment of such credit quantified at Rs.9,16,833.00 and imposing a penalty equivalent to 10% of tax quantified at Rs.4,27,387.00 that a demand of Rs.56,18,089.00 was raised which is followed by a demand notice and feeling aggrieved the petitioner is before this Court.

Mr. Kejriwal, learned counsel for the petitioner while straightway inviting the attention of this Court to Section 140 of 'the BGST Act' submitted that the same enables the taxpayers to carry forward the input tax credit under the Value Added Tax Act and/or Entry Tax Act, as the case may be, to his electronic credit ledger and for which a period has been prescribed. According to Mr. Kejriwal, it is under this enabling provision that the petitioner filed his application at Annexure 5 to carry forward the input tax credit earned by the petitioner under 'the VAT Act' and 'Entry Tax Act' which application according to Mr. Kejriwal was within time. According to the learned counsel, the respondent Assistant Commissioner of State Taxes in absolute abuse of statutory power while rejecting the said application, has proceeded to exercise jurisdiction under section 73 of 'the BGST Act' and since

according to respondent no.3, the petitioner had wrongly availed input tax credit under 'the VAT Act' and 'Entry Tax Act', the claim for transitional credit to the tune of Rs.42,73,869.00 was held contrary to the provisions of Section 140 of 'the BGST Act' read alongside Rule 117 framed thereunder and thus liable for rejection.

According to Mr. Kejriwal, learned counsel for the petitioner, even if the application filed by the petitioner under section 140 of 'the BGST Act' on the claim of transitional BGST credit was not found lawfully sustainable, it was liable for rejection but certainly a rejection of such claim did not empower the respondent no.3, Assistant Commissioner of State Taxes to convert the said proceedings into a proceeding under section 73 of 'the Act' for assessment of liability as well as for levy of interest and penalty. According to Mr. Kejriwal, the two proceedings are independent to each other and could not have been amalgamated.

Questioning the order passed by the Assistant Commissioner of State Taxes on merits, it is the argument of Mr. Kejriwal that the application filed by the petitioner under section 140 of 'the BGST Act' claiming transitional BGST credit on the basis of carry forward input tax credit earned by the petitioner under 'the VAT Act' and 'the Entry Tax Act' as manifest from the assessment orders at Annexures 2 series which confirms the credit

earned by the petitioner to the tune of Rs.18,33,304.76 for the financial year 2007-08 and Rs.20,79,256.00 for the financial year 2011-12, is a matter of record. It is the argument of Mr. Kejriwal that even if a refund application has been rejected, the petitioner would be taking statutory recourse but in so far as the issue of claiming transitional BGST credit is concerned, since as according to the petitioner, he was entitled to claim such transitional credit, which on application made by the petitioner was reflected in his electronic credit ledger as also confirmed from the chart at Annexure 7 as on 1.7.2017 but until such time that the respondents can demonstrate that the petitioner either availed or utilized the said credit, no proceeding under section 73 of 'the BGST Act' is sustainable and the exercise is dehors the statutory prescriptions.

The short argument advanced by Mr. Kejriwal is that a mere reflection of the transitional credit on the application filed by the petitioner under section 140 of 'the Act', would not amount to either availing or utilizing the credit nor would be sufficient to invite a proceeding under section 73 of 'the Act' until such time that the respondents by reference to records are able to demonstrate that the said credit was either availed of or utilized by the petitioner. As regarding utilization of the input tax credit of Rs.96,077/- is concerned, learned counsel submits that apart from

the fact that this credit is not relatable to the financial year 2007-08 or 2011-12, the said amount was remitted back and shown in the return filed for the month of August, 2018. He submits that similarly in so far as the tax for the period October, 2018 is concerned, the deficit amount of Rs.55,134/- was deposited and thus, the petitioner has never availed credit or utilized credit so reflected in the ledger for the period 2007-08 or 2011-12. In reference to the credit balance reflected in the ledger of the petitioner at Annexure 7 he submits that while the opening balance shown in July, 2017 reads Rs.43,21,945.00, the said balance has more or less remained at the same position. It is the specific case of Mr. Kejriwal that never has the petitioner claimed any credit rather as on date the petitioner has paid all his taxes and thus, there cannot be any issue of either availment or utilization of the credit reflected in his electronic credit ledger.

The argument of Mr. Kejriwal has been contested rather seriously by Mr. Vikash Kumar, learned SC11, and the main thrust is on the conduct of the petitioner in filing an application under section 140 of ‘the BGST Act’ to claim transitional credit of the input tax credit earned by the petitioner under ‘the VAT Act’ and ‘the Entry Tax Act’ liable to be carried forward under ‘the BGST Act, 2017’. According to the learned State Counsel, the very fact

that the petitioner filed an application under section 140 of 'the Act' and the credit balance got reflected in his electronic credit ledger on 1.7.2017, it would amount to availing credit and thus, in view of the provisions underlying Rule 117 read alongside Rule 121 of 'the Rules', since the petitioner had wrongly availed credit, he was liable for being proceeded under section 73 of 'the BGST Act' and there is thus no infirmity in the order passed by the respondent no.3. Learned counsel in reference to the provisions underlying Section 73 of 'the Act' submits that it allows penal proceedings against a dealer who has wrongly availed or utilized input tax credit. According to Mr. Vikash Kumar, learned SC11, even if, learned counsel for the petitioner has tried to demonstrate that he has not utilized the transitional credit but the moment the same is reflected in the electronic credit ledger, on the application filed by the petitioner under section 140 of 'the BGST Act', it amounts to availment and the period for which such availment has been made by the petitioner, he is liable to pay interest as well as penalty. Learned counsel in support of his submissions has relied upon the judgment of the Supreme Court reported in (2011)4 SCC 635 (**Union of India & ors. vs. Ind. Swift Laboratories Ltd.)** and in particular reference to the opinion expressed at Paragraphs 15,16, 18 and 21 of the judgment it is submitted that the position

has been clarified by the Supreme Court and the petitioner cannot escape liability. Learned State Counsel in reference to the stand taken by the department at paragraphs 5, 8, 13, 15 and 17 of the counter affidavit has submitted that the respondents in reference to the statutory prescriptions present in 'the BGST Act' on the issue have suitably explained the reasons for initiation of the penal proceeding as well as for raising of the demand.

Having heard learned counsel for the parties I am of the opinion that two preliminary issues fall for consideration and which has also been noted in the order of this Court passed on 15.3.2019 which reads under:

> "(a) Whether or not the reflection of Rs.42 lacs approximately in the electronic credit ledger of the petitioner is a confirmation of availment or his entitlement for utilization.
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> (b) Whether the petitioner could have been subjected to a proceeding under section 73 of the Bihar Goods and Service Tax Act, 2017 for the entire credit reflecting in the ledger without quantification of the amount which has been either availed or utilized.

The facts on record are not in dispute rather what is to be seen is whether, the credit reflected in the electronic credit ledger of the petitioner amounts to either availment or utilization of the credit.

Annexures 2 series are a confirmation of the fact that there was an input tax credit to the tune of Rs.18,33,304.76 in favour of the petitioner for the period 2007-08 and to the tune of Rs.20,79,256.00 for the period 2011-12 for the taxes deposited under ‘the VAT Act’ and ‘the Entry Tax Act’. It is again not in dispute that one of the refund applications for these credits, have been rejected and the petitioner would be taking recourse to the statutory remedy as available to him in law to pursue his grievance as canvassed by Mr. Kejriwal.

In so far as the issue in dispute is concerned, while it is the argument of Mr. Kejriwal that the petitioner having paid all his taxes as until date, there is no question of either availment or utilization of transitional credit, the argument has been contested by Mr. Vikash Kumar, learned SC11 by submitting that the reflection in the electronic credit ledger itself would amount to availment and since according to the assessing authority, the petitioner was not entitled to such availment, he is liable for proceeding under section 73 read alongside Rules 117 and 121 of the Rules framed thereunder.

Whether or not the claim of the petitioner under section 140 of ‘the Act’ in seeking transitional credit has been rightly rejected, I would express no opinion in view of the stand taken by

the petitioner in not pressing the relief No. 1(b) and (c) of the writ petition as according to Mr. Kejriwal the petitioner would be taking recourse to the statutory remedy so available to him in law for such relief.

In order to appreciate whether the proceedings initiated by the Assistant Commissioner of State Taxes under section 73 of 'the BGST Act' read with section 50 thereof, is in tune with the statutory provisions regulating such exercise, I am persuaded to bear note of the statutory prescriptions which lie at the foundation of such exercise and has been relied upon by the learned counsel for the parties.

The order passed by the Assistant Commissioner of State Taxes put to challenge in this writ petition in so far as it raises a demand of tax together with interest and penalty thereon holds that since the claim of transitional BGST credit amounting to Rs.42,73,869.00 could not be substantiated by the returns filed by the petitioner that for recovery of wrongly availed credit a proceedings under section 73 of 'the BGST Act, 2017' was initiated and show cause notice was served on the petitioner. This is the foundation for the penal proceedings. The order also records appearance of the representative of the petitioner, who submitted that the transitional credit was not utilized and thus, no penal

proceeding was sustainable. The Assistant Commissioner of State Taxes by placing reliance on Section 142(3) of 'the BGST Act' rejected the claim of transitional BGST credit amounting to Rs.42,73,869.00 as not being in tune with the prescriptions underlying section 140 of 'the BGST Act' read with Rules 117 of the Rules and consequentially, it is for recovery of the wrongly availed credit that the demand was raised.

The issue before us is whether at all the credit was availed by the petitioner, for which the proceeding was initiated. Annexure 7 is the extract of electronic credit ledger showing credit balance in favour of the petitioner and confirms that right since July, 2017 as until November, 2018 there has been no change in situation on the credit balance except for minor shifts here and there. As I have noted, it is the specific argument of Mr. Kejriwal that at no stage any credit has been availed by the petitioner. It is rather contended that the petitioner has regularly deposited his taxes which were found payable. There is nothing on record of the proceedings nor the impugned order anywhere discusses that this credit was ever availed of by the petitioner to meet any tax liability for any particular period and which was recoverable under the proceedings so initiated.

Section 73 of 'the Act' relied upon by the learned State Counsel in support of the impugned action together with Rule 117 and Rule 121 reads under:

> "**S.73**. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any willful 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 utilized for any reason, other than the reason of fraud or any willful 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 utilized 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 leviable under the provisions of this Act or the rules made there under.
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> (2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.
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> (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 utilized for such periods other than

those covered under sub-section (1), on the person chargeable with tax.

(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax 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) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under Section 50 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) or, as the case may be, the statement under sub-section (3), 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) or sub-section (3) pays the said tax along with interest payable under Section 50 within thirty days of issue of show cause notice, no penalty shall be

payable and 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 person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within three 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 utilized relates to or within three years from the date of erroneous refund.

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax. (Emphasis supplied)

Rule 117. Tax or duty credit carried forward under any existing law or on goods held in stock on the appointed day.-(1) Every registered person entitled to take credit of input tax under Section 140 shall, within ninety days of the appointed day, submit a declaration electronically in **FORM GST TRAN-1**, duly signed, on the common portal specifying therein, separately, the amount of input tax credit to which he is entitled under the provisions of the said section.

Provided that the Commissioner may, on the recommendations of the Council, extend the period of ninety days by a further period not exceeding ninety days:

Provided that in the case of a claim under sub-section (1) of Section 140, the application shall specify separately-

(i) the value of claims under Section 3, sub-section (3) of Section 5, Section 6 and 6A and sub-section (8) of Section 8 of the Central Sales Tax Act, 1056 made by the applicant; and

(ii) the serial number and value of declarations in Forms C and/or F and certificates in Forms E and/or H or Form I specified in Rue 12 of the Central Sales Tax (Registration and Turnover) Rules, 1957 submitted by the applicant in support of the claims referred to in sub-clause (i) above.

(2) Every declaration under sub-rule (1) shall-

(a) in the case of a claim under sub-section (2) of Section 140, specify separately the following particulars in respect of every item of capital goods as on the appointed day-

(i) the amount of tax or duty availed or utilized by way of input tax credit under each of the existing laws till the appointed day; and

(ii) the amount of tax or duty yet to be availed or utilized by way of input tax credit under each of the existing laws till the appointed day;

(b) in the case of a claim under sub-section (3) or clause (b) of sub-section (4) or sub-section (6) or sub-

section (8) of Section 140, specify separately the details of stock held on the appointed day;

(c) in the case of a claim under sub-section (5) of Section 140, furnish the following details, namely:-

(i) the name of the supplier, serial number and date of issue of the invoice by the supplier or any document on the basis of which credit of input tax was admissibe under the existing law;

(ii) the description and value of the goods or services;

(iii) the quantity in case of goods and the unit or unit quantity code thereof;

(iv) the amount of eligible taxes and duties or, as the case may be, the value added tax or entry tax charged by the supplier in respect of the goods or services; and

(v) the date on which the receipt of goods or services is entered in the books of account of the recipient.

(3) The amount of credit specified in the application in **Form GST TRAN-1** shall be credited to the electronic credit ledger of the applicant maintained in **FORM GST PMT-2** on the common portal.

(4) (a)(i) A registered person, holding stock of goods which have suffered tax at the first point of their sale in the State and the subsequent sales of which are not subject to tax in the State availing credit in accordance with the proviso to sub-section (3) of Section 140 shall be allowed to avail input tax credit on goods held in stock on the appointed day in respect of which he is not in possession of any document evidencing payment of value added tax.

(ii) The credit referred to in sub-clause (i) shall be allowed at the rate of sixty per cent on such goods which attract State tax at the rate of nine per cent or more and forty per cent for other goods of the State tax applicable on supply of such goods after the appointed date and shall be credited after the State tax payable on such supply has been paid;

Provided that where integrated tax is paid on such goods, the amount of credit shall be allowed at the rate of thirty per cent and twenty per cent respectively of the said tax.

(iii) The scheme shall be available for six tax periods from the appointed date.

(b) Such credit of State tax shall be availed subject to satisfying the following conditions, namely:-

(i) such goods were not wholly exempt from tax under the Bihar Value Added Tax Act, 2005;

(ii) the document for procurement of such goods is available with the registered person;

(iii) the registered person availing of this scheme and having furnished the details of stock held by him in accordance with the provisions of clause (b) of sub-rule (2) of Rule 1, submits a statement of **FORM GST TRAN 2** at the end of each of the six tax periods during which the scheme is in operation indicating therein the details of supplies of such goods effected during the tax period;

(iv) the amount of credit allowed shall be credited to the electronic credit ledger of the applicant maintained in **FORM GST PMT-2** on the Common Portal.

(v) the stock of goods on which the credit is availed is so stored that it can be easily identified by the registered person.

Rule 121. Recovery of credit wrongly availed.- The amount credited under sub-rule (3) of Rule 117 may be verified and proceedings under section 73 or, as the case may be, Section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly."

While Section 73 of 'the BGST Act' enables proceedings for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for reasons other than fraud or willful misstatement or suppression of fact, where such default is committed by reason of fraud or willful misstatement or suppression of fact, a similar procedure inviting such action is provided under section 74 of 'the BGST Act'.

It is undisputed that it is on the application made by the petitioner under section 140 of 'the BGST Act' that the credit earned got reflected on the electronic credit ledger on 28.8.2017 as admitted by Mr.. Kejriwal showing a credit balance of Rs.42,73,891.00 as also taken note of in the order impugned.

Section 73 makes a dealer liable for proceedings in case of short payment of taxes or erroneously refunded taxes or for wrongly availing or utilizing input tax credit. According to Mr.

Vikash Kumar, learned SC11, the reflection on the electronic credit ledger is a confirmation of a wrong availment even if, the said credit was not utilized and which act is liable for proceeding under section 73 of 'the BGST Act'.

I have reproduced the relevant provisions of the 'BGST Act' which finds mention in the discussion held for ready reference. The legislative intent present in these provisions is eloquent and I am in no confusion to hold that be it a charge of wrong availment or utilization, each is a positive act and it is only when such act is substantiated that it makes the dealer concerned, liable for recovery of such amount of tax as availed from the input tax credit or utilized by him but in each of the two circumstances, the tax available at the credit of the dealer concerned must have been brought into use by him thus, reducing the credit balance. A plain reading of Section 73 would confirm that it is only on such availment or utilization of credit to reduce tax liability, which is recoverable under section 73(1) read alongside the other provisions present thereunder. In fact the position is made even more clear by reading the said provision alongside sub-section (5), (7), (8), (9) to (11).

Despite the legal intent being so loud and clear, it is on absolute misappreciation of the statutory prescriptions and even when the amount of Rs.42 lacs and odd yet remains to the credit of

the petitioner which is also confirmed from the credit ledger status available at Annexure 7 that the Assistant Commissioner of State Taxes by treating the said amount to be a tax outstanding on wrong availment by the petitioner, initiates proceeding for recovery of the said tax amount and since according to the Assistant Commissioner of State Taxes it was an act of wrong availment by the petitioner, the respondent no.3 subjects him to interest as well as penalty which together quantifies a demand of Rs.56,18,089.00.

In my opinion, the Assistant Commissioner of State Taxes has somewhere got confused to treat the transitional credit claimed by the dealer as an availment of the said credit when in fact an availment of a credit is a positive act and unless carried out for reducing any tax liability by its reflection in the return filed for any financial year, it cannot be a case of either availment or utilization. It is rightly argued by Mr. Kejriwal that even if the respondent no.3 was of the opinion that the petitioner was not entitled to such transitional credit at best, the claim could be rejected but such rejection of the claim for transitional credit does not bestow any statutory jurisdiction upon the assessing authority to correspondingly create a tax liability especially when neither any such outstanding liability exists nor such credit has been put to use.

Had it been a case where the credit shown in electronic ledger, was availed or utilized for meeting any tax liability for any year, there would be no error found in the action complained but it would be stretching the term 'availment' beyond prudence to treat the mere reflection of the transitional credit in the electronic credit ledger as an act of availment, for drawing a proceeding under section 73(1) of 'the BGST Act'. The provisions underlying Section 73 is self eloquent and it is only if such availment is for reducing a tax liability that it vests jurisdiction in the assessing authority to recover such tax together with levy of interest and penalty under section 50 but until such time that the statutory authority is able to demonstrate that any tax was recoverable from the petitioner, a reflection in the electronic credit ledger cannot be treated as an 'availment'.

The judgment of the Supreme Court rendered in the case of **Ind. Swift Laboratories Ltd. (supra)** is an expression on situation where such credit has been utilized by a dealer and it is in such circumstances that the Supreme Court bearing note on the adjudication done by Settlement Commission, has recorded its opinion.

In so far as the present case is concerned, Annexure 2 series confirms that the petitioner has an input tax credit in his favour under the Value Added Tax Act and the Entry Tax Act. Now whether he is entitled for refund of this credit or entitled to carry it forward in the transitional credit, may be a subject matter of proceeding pending before the statutory authority but nonetheless, it is definitely a confirmation of the fact that there is no tax outstanding against the petitioner which is recoverable.

The legislative intent reflected from a purposeful reading of the provisions underlying section 140 alongside the provisions of section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in an electronic ledger on its own is not sufficient to draw penal proceedings until the same or any portion thereof, is put to use so as to become recoverable.

This important aspect of the matter has eluded the wisdom of the respondent no.3 while passing the order. In fact it is on a complete misappreciation of legal position which lies at the foundation of the demand raised by the impugned order whereby the credit amount reflected in the credit ledger to the tune of Rs.42,73,869.00 has been treated as an outstanding tax liability against the petitioner to order for its recovery together with interest

and penalty even when the electronic credit ledger status at Annexure 7 confirms to a credit in favour of the petitioner i.e. a negative tax liability.

For the reasons and discussions above, the order dated 6.11.2018 passed by the respondent no.3, the Assistant Commissioner of State Taxes in purported exercise of power vested in him under section 73 of 'the BGST Act' is held per se illegal and an abuse of the statutory jurisdiction and is accordingly quashed and set aside.

The writ petition is allowed.

(Jyoti Saran, J)

Arvind Srivastava, J.
I agree.

(Arvind Srivastava, J)

Surendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	18.07.2019
Transmission Date	NA