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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.12.2021

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.NO.3474 OF 2021

AND

W.M.P.NOS.3980 & 3982 OF 2021

(THROUGH VIDEO CONFERENCING)

M/s.Aathi Hotel,
Represented by its Proprietor,
S.Vaithiyanathan,
No.2, Koranad Road,
Mayiladuthurai,
Nagapattinam District - 609 001. ... Petitioner

Vs

The Assistant Commissioner (ST) (FAC),
Mayiladuthurai,
Nagapattinam District. ... Respondent

Prayer:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records on the file of the respondent in his impugned proceedings made in GSTIN: 33AEBPV4994DIZB/TRAN-1 dated 06.02.2020 (received on 21.01.2021) quash the same as illegal and contrary to law.

For Petitioner : Mr.S.Rajasekar

For Respondent : Mr.Richardson Wilson
Additional Government Pleader

ORDER

The petitioner had challenged the impugned order dated 06.02.2020, which reads as under:-



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**PROCEEDINGS OF THE ASSISTANT COMMISSIONER (ST) (FAC),
MAYILADUTHURAI.**

PRESENT: THIRU G. ELANGO VAN

GSTIN: 33AEBPV4994D1ZB /TRAN - 1

DATED 06.02.2020

Sub.: Tamil Nadu Goods and Services Tax Act, 2017 – Tvl. Hotel Aadhi – Thiru Sundaram Vaithiyathan – TRAN 1 filed – Transitional Input Tax Credit on capital goods availed – assessment u/s 74 – notice issued – reply received – orders passed - reg.

- Ref.:** 1) TRAN – 1 filed by the taxpayer on 28.08.2017.
2) Monthly Returns filed by the taxpayer in Form I under the Tamil Nadu Value Added Tax Act, 2006, during the year 2016-17 and 2017-18.
3) This Office Notice intimating discrepancies in Reference No. 210905190014963 dated 09.05.2019.
4) DRC 01 issued in Reference No.: 210905190014963 dated 31.12.2019.
5) Personal Hearing on 04.02.2020.
6) Reply furnished by the taxpayer on 04.02.2020.

ORDER:

Tvl. Aathi Hotel is a registered taxpayer under the Tamil Nadu Goods and Services Tax Act, 2017, with GSTIN: 33AEBPV4994D1ZB, having migrated from the Tamil Nadu Value Added Tax Act, 2006 (TIN: 33806408711).

The taxpayer had filed his statement of Transitional Input Tax Credit in TRAN 1 under Section 140(2) of the Tamil Nadu Goods and Services Tax Act, 2017 read with Rule 117(1) & (2) of the Tamil Nadu Goods and Services Tax Rules, 2017, claiming an SGST (State Tax) amount of Rs. 3,86,271/- as Transitional Input Tax Credit on capital goods unavailed under TNVAT Act, 2006.

But the unavailed capital goods ITC as per VAT returns was Rs. 229850/-. Hence, the excess amount of Rs. 156421/- is not allowable. In respect of the amount Rs. 229850/-, the dealer submitted invoices.

On detailed scrutiny, it is found that,

1) though the dealer has registered himself as star hotel, the dealer does not possess the mandatory certificate from the Tourism Department, meaning that the dealer cannot avail ITC under Sec. 7(1)(a) of the TNVAT Act, 2006.

2) since the dealer is a hotelier, he comes under Sec. 7(1)(b), read with Sec. 7(2) of the TNVAT Act, 2006, where ITC is not available.



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3) on verification of the invoices it is found that the dealer had purchased mattresses, pillows, electrical goods, water heater, plywoods, paints, etc. i.e. those goods which go into the making of the hotel for accommodation purpose. As per Sec. 17(5)(d) of TNGST Act, 2017, ITC in respect of the goods/services used for the construction of immovable property, is blocked.

4) As per Sec. 140(2) of the TNGST Act, 2017, the ITC claimed through TRAN I must be admissible under both the TNVAT Act and the TNGST Act. But in view of the points mentioned afore, the said ITC is not admissible under both the Acts.

5) Furthermore, the dealer has stated in his reply that he was engaged in the business of furniture. But he did not produce any sale invoices to prove his version. Also, he had got his registration under TNVAT only as a hotelier not as a retailer in furniture and neither did he make any intimation to the office regarding his retailer business earlier. Hence, the dealer's reply is not accepted.

For the reasons stated above, the said amount of Rs. 386271/- is assessed under Sec. 74 of the Tamil Nadu Goods and Services Tax Act, 2017 as under:

Tax payable – Rs. 3,86,271/- (Rupees three lakh, eighty-six thousand, two hundred and seventy-one only)

Penalty payable @100% – Rs. 3,86,271/- (Rupees three lakh, eighty-six thousand, two hundred and seventy-one only)

Interest payable @ 24% - Rs. 2,32,651/- (Rupees two lakh, thirty-two thousand, six hundred and fifty-one only)

DRC – 07 issued.

A-
Assistant Commissioner (ST),
Mayiladuthurai.

To
Tvl Hotel Aadhi – Thiru Sundaram Vaithiyathan
No. 2 Road Koranad 609001

2. It is the case of the petitioner that though the petitioner had filed TRAN-1 and claimed a credit of Rs.3,86,271/-, the aforesaid credit was never utilized and therefore even though the petitioner had failed to reply to the Show Cause Notice dated 09.05.2019 followed by a summary Show Cause Notice dated 31.12.2019, the question of levying interest and imposing penalty on the petitioner under the provisions of Tamil Nadu Goods and Services Tax Act, 2017 does not arise inasmuch as the entire transitional credit of Rs.3,86,271/- was reversed by the petitioner in the monthly returns for the month of January 2020 for the Assessment Year 2019-2020.



3. The learned counsel for the petitioner submits that Section 74 of the Tamil Nadu Goods and Services Tax Act, 2017 will get attracted only where there is a wrong utilization of credit availed. In this connection, the learned counsel for the petitioner has referred to Section 50 (3) of the Act. It is submitted that interest under Section 50 (3) of the Act will apply only in the case of a person who makes undue or excess claim of Input Tax Credit under sub-section 10 of Section 42 or undue or excess reduction in output tax liability under sub-section 10 of Section 43 in which case, interest shall be paid on such undue or excess claim or on such undue or excess reduction/deduction as the case may be, at such rate not exceeding 24 percentage as may be notified by the Government on the recommendations of the GST Council.

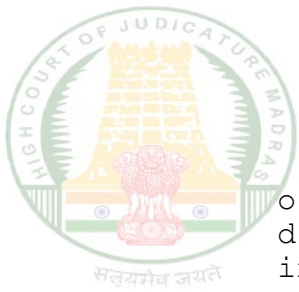
4. The learned counsel for the petitioner further submits that Section 42 (10) of the Tamil Nadu Goods and Services Tax Act, 2017 is not attracted in the facts and circumstances of the case, as the petitioner has never utilized the credit which was attempted for transition by filing TRAN-1. He submits that sub-section 10 to Section 42 will apply when the amount reduced from the output tax liability in contravention of the provisions of sub-section 7 which has to be added to the output tax liability of the recipient in his return for the month in which contravention takes place and such recipient shall be liable to pay tax/interest on the amount so added at the rate specified under sub-section 3 of Section 50 of the Tamil Nadu Goods and Services Tax Act, 2017.

5. The learned counsel for the petitioner further submits that Section 42 (7) will not apply as Section 47 (2) applies to the situation where will apply, in the case of a recipient. Section 42(7) of the Act reads as under:-

"Section 42. Matching, reversal and reclaim of input tax credit-

(7). The recipient shall be eligible to reduce, from his output tax liability, the amount added under sub-Section (5), if the supplier declares the details of the invoice or debit note in his valid return within the time specified in sub-Section (9) of Section 39."

6. The learned counsel for the petitioner has also referred to decision of the Hon'ble Division Bench of the Patna High Court in the case of Commercial Steel Engineering Corporation Vs. State of Bihar, [2019] 28 GSTL 579 (Patna). A specific reference was made to Paras 29 and 35 & 36 which reads as under:-



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"29. 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).

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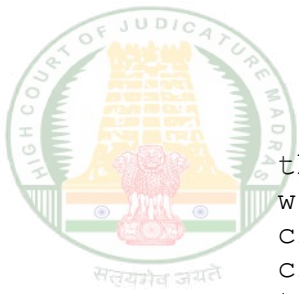
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35. The legislative intent reflected from a purposeful reading of the provisions underlying section 140 alongside the provisions of section 73 and Rules 117 and 121 is that even a wrongly reflected transitional credit in an electronic ledger on its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

36. 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



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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."

7. Opposing the prayer, the learned Additional Government Pleader for the respondent submits that the petitioner has an alternate remedy under Section 107 of the Tamil Nadu Goods and Services Act, 2017 and therefore this writ petition is liable to be dismissed.

8. The learned Additional Government Pleader for the respondent submits that the petitioner has an alternate remedy before the Appellate Commissioner and therefore the writ petition is liable to be dismissed. The learned Additional Government Pleader for the respondent further submits that the petitioner was neither entitled to Input Tax Credit under the provisions of the erstwhile Tamil Nadu Value Added Tax Act, 2006 nor entitled to transition in the credit under the provisions of Tamil Nadu Goods and Services Tax Act, 2017 and therefore submits even on merits the petitioner is liable to pay interest and penalty for availing the transitional credit wrongly.

9. The learned Additional Government Pleader for the respondent further submits that the petitioner has admitted that the petitioner was not registered as a dealer of furniture products under the TNVAT Act, 2006 and therefore the attempt of the petitioner to avail credit and transition the same shows that the petitioner's intention was not bonafide but was to wrongly utilize the input tax credit which was not available to the petitioner.

10. That apart, it is submitted that the petitioner had un-availed credit for a sum of Rs.2,29,850/- whereas the petitioner transitioned a credit of Rs.3,86,271/- with a view to wrongly utilize the same.

11. The learned Additional Government Pleader for the respondent further submits that the interest is consequential and the penalty is also consequential in terms of the Section 74 of the TNGST Act, 2017 and therefore prays for the dismissal of the writ petition.

12. Heard the learned counsel for the petitioner and the learned Additional Government Pleader for the respondents and perused the impugned order and the decision of the Hon'ble Patna High Court referred to supra.



13. The undisputed facts of the case are that the petitioner is a hotelier and had purchased certain capital goods in connection with the business. Since GST was being implemented, the petitioner appears to have availed input tax credit paid on the capital goods which were purchased in connection with the hotel business with a view to set off the tax liability on the furniture business which the petitioner intended to start.

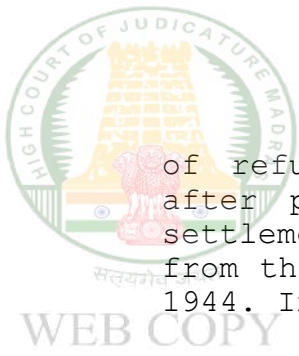
14. There are no record to show that the petitioner had started such business in sale of furniture. What is evident is that the petitioner had wrongly attempted to transitioned a credit of Rs.3,86,271/- hoping that in case of future tax liability, the petitioner can use the same against the tax liability. Thus, the intention of the petitioner was not bonafide.

15. After Show Cause Notice was issued to the petitioner on 09.05.2019, the petitioner replied and admitted the mistake by a reply dated 04.02.2020. The petitioner also reversed the transitional credit in the returns filed for the month of January 2019-20 in Form GSTR-3B under Rule 61(5) of the TNGST Rules, 2017. There are no records to show utilization of such credit.

16. Thus, the facts on record indicates that though an improper attempt was made by the petitioner to transition the aforesaid credit. The petitioner had however not utilized the same and had also reversed the same on 10.02.2020 after a Show Cause Notice were issued within a period prescribed under Section 73 of TNGST Act, 2017 by invoking Section 74 of the TNGST Act, 2017. However, the Show Cause Notice does not invoke the ingredients to justify the invocation of Section 74 of the TNGST Act, 2017 against the petitioner.

17. Be that as it may, if the Show Cause Notice issued to the petitioner on 09.05.2019 is to be construed as a notice under Section 74 of the TNGST Act, 2017, the Show Cause Notice should have specifically invoked the ingredients of Section 74 (1) of the TNGST Act, 2017. However, the said notice merely states that due to the unavailability of documents to prove admissibility of the ITC, Assessment under Section 74 is proceeded. Thus, the Show Cause Notice dated 31.12.2019 does not meet the requirements of Section 74(9) of the TNGST Act, 2017.

18. The Hon'ble Supreme Court in Union of India Vs. Ind-Swift Laboratories Limited [2011] 4 SCC 635 while construing the provisions of erstwhile Cenvat Credit Rules 2002, held that wrong filing of credit rule attracts interest under the Provisions of the Cenvat Credit Rules 2002 read with Central Excise Act, 1944. There the credit was availed and the benefit



of refund was claimed. The case was attempted to be settled after payment of the amount ITC availed utilized before the settlement commission which circled interest at 10% per annum from the due date as per Section 11 AB of the Central Excise Act, 1944. In paragraph 17 the Court held as under:-

"17. We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "Or" appearing in Rule 14, twice, could be read as "AND" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "OR" in between the expressions 'taken' or 'utilized wrongly' or 'has been erroneously refunded' as the word "AND". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest"

19. The ratio in the above case is to be distinguished on facts as in the present case although credit was wrongly attempted to be transitioned, it was never utilized. Further



before levying penalty or interest, a proper excise was required to be made by a proper officer under Section 74(10) after ascertaining whether the credit was wrongly availed and wrongly utilised. Though under Sections 73(1) and 74(1) of the Act, proceedings can be initiated for mere wrong availing of Input Tax Credit followed by imposition of interest penalty either under Section 73 or under Section 74 they stand attracted only where such credit was not only availed but also utilised for discharging the tax liability. The proper method would have been to levy penalty under Section 122 of TNGST Act, 2017.

20. Considering the above, I am inclined to hold that the petitioner is not liable to penalty imposed. At the same time, since there was an attempt to wrongly avail credits and utilise the same as and when the tax liability would have arisen, the petitioner is held liable to a token penalty. Considering the gravity of the mistake committed by the petitioner, a penalty Rs.10,000/- is imposed on the petitioner. The impugned order stands partly quashed.

21. Accordingly, this writ petition stands partly allowed in terms of the above observations. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS II)

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Sub Assistant Registrar

rgm/jas

To

The Assistant Commissioner (ST) (FAC),
Mayiladuthurai,
Nagapattinam District.

+1cc to the Special Government Pleader (Taxes), S.R.No.65512

W.P.No.3474 of 2021

and

W.M.P.Nos.3980 & 3982 of 2021

SS(CO)

PM/27/01/2022