

[2019] 104 taxmann.com 393 (TELANGANA)

HIGH COURT OF TELANGANA

Megha Engineering & Infrastructures Ltd.

v.

Commissioner of Central Tax

V. RAMASUBRAMANIAN AND P. KESHAVA RAO, JJ.

WRIT PETITION NO. 44517 OF 2018

APRIL 18, 2019

Gandra Mohan Rao *for the Petitioner.* **B. Narasimha Sarma**, Sr. Standing Counsel *for the Respondent.*

ORDER

V. Ramasubramanian, J. - Aggrieved by a demand made by the respondent for payment of interest on the ITC portion of the tax paid for the months of July, 2017 to May, 2018, the petitioner has come up with the above writ petition.

2. Heard Mr. Gandra Mohan Rao, learned counsel for the petitioner and Mr. B. Narasimha Sarma, learned Senior Standing Counsel for the Department.

3. The petitioner is engaged in the manufacture of MS Pipes and in the execution of infrastructure projects. After the enactment of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act, 2017'), the petitioner registered themselves as a dealer under the Act and they claim to be regularly filing returns and paying taxes.

4. Under the CGST Act, 2017, the registration of dealers, input tax credit, filing of returns, payment of duty and issue of notices, all happen only on-line. All Assesses are required to log into the GST Portal for payment of duty and for filing of returns. The Assesses are required under the Act to file a return in Form GSTR - 3B on or before the 20th of every month, for the discharge of their liability of the previous month. The GST liability is permitted to be discharged by utilizing the ITC available. An electronic ledger is maintained, showing the amount available to the account of an assessee through the ITC.

5. The case of the petitioner is that the GST Portal is designed in such a manner that unless the entire tax liability is charged by the assessee, the system will not accept the return in GSTR - 3B Form. As a result, even if an Assessee was entitled to set off, to the extent of 95%, by utilizing the ITC, the return cannot be filed unless the remaining 5% is also paid.

6. It appears that there was a delay on the part of the petitioner in filing the returns in GSTR - 3B Forms, for the period from October, 2017 to May, 2018. This was due to the shortage of ITC, available to off-set the entire tax liability. According to the petitioner, the delay in filing the returns was also not huge. The returns for the months of October and November, 2017 and February and May, 2018 were filed with a delay of only one day. The return for December, 2017 was filed with a delay of three days. The return for January, 2018 was filed with a delay of seventeen days, the return for April, 2018 was filed with a delay of nineteen days and the return for March, 2018 was filed with a delay of twenty nine days.

7. According to the petitioner, the total tax liability of the petitioner for the period from July, 2017 to May, 2018 was Rs.1014,02,89,385/- and the ITC available to the credit of the petitioner during this period was Rs.968,58,86,133/-.

8. Thus, there was a short fall to the extent of 45,44,03,252/-, which the petitioner was obliged to pay by way of cash. According to the petitioner, they could not make payment and file the return within time due to certain constraints. However, the entire liability was wiped out in May, 2018.

9. After the petitioner discharged the entire tax liability, the Superintendent of Central Tax issued letters dated 29.06.2018 and 06.07.2018 demanding interest at 18%, in terms of Section 50 of the CGST Act, 2017. The Assistant Commissioner also issued a letter dated 04.10.2018 demanding payment of interest.

10. In response, the petitioner sent a letter dated 15.10.2018, pointing out that interest is to be calculated only on the net tax liability after deducting ITC from the total tax liability. The petitioner also paid an amount of Rs.30,92,522/- towards interest on their net tax liability.

11. However, the Department demanded interest on the total tax liability and hence the petitioner has come up with the above writ petition.

12. The respondents have filed a counter affidavit contending *inter alia* that under Section 39(7), every registered person, who is required to furnish a return, should have paid to the Government, the tax due as per such return, not later than the last date on which he is required to furnish such return; that Section 50 of the Act imposes a burden in the form of interest, upon every person who is liable to pay tax, but failed to pay the same; that the liability to pay interest under Section 50 (1), is a statutory obligation which the registered persons are obliged to comply on their own accord; that Section 50 (1) is not confined only to the cash component of the tax payable; that the claim of the petitioner is based upon the wrong presumption as though ITC amount was lying with the Government Treasury; and that since the liability under Section 50 is not penal in nature, the petitioner cannot escape liability.

13. From the pleadings, the only issue that arises for consideration is as to whether the liability to pay interest under Section 50 of the CGST Act, 2017 is confined only to the net tax liability or whether interest is payable on the total tax liability including a portion of which is liable to be set-off against ITC?

14. For finding an answer to the said question, we may have to look at (i) the procedure for filing of returns and payment of tax; (ii) the eligibility and conditions for taking input tax credit and (iii) the wording of Section 50.

FILING OF RETURNS:

15. Under Section 40 of the CGST Act, 2017, the procedure for filing of the first return, corresponding to the period between the date on which the dealer became liable to registration, till the date on which registration is granted, is prescribed.

16. Under Section 39, a detailed procedure is stipulated for the filing of the monthly returns. In brief, the Scheme of Section 39 is as follows:

- (i) Every registered person should furnish for every Calendar Month or part thereof, a return, electronically, of inward and outward supplies of goods or services, ITC availed, tax payable, tax paid etc., on or before the 20th day of the succeeding calendar month;
- (ii) The Commissioner is empowered to extend, by notification, for reasons to be recorded in writing, the time limit for furnishing the returns, for such Class of registered persons;
- (iii) Every registered person, who is required to furnish a return, should pay to the Government the tax due as per such return not later than the last date on

which he is required to furnish such return;

- (iv) If a registered person discovers any omission or incorrect particulars in the return already filed by him, he shall rectify such omission or incorrect particulars in the return to be furnished.

17. We should point out that what we have indicated in the preceding paragraph as the essence of Section 39, are confined only to every registered person other than an input service distributor or a non-resident taxable person or a person paying tax under Section 10/51/52.

CLAIM OF ITC:

18. Section 41 deals with the claim of ITC and the provisional acceptance thereof. Under this provision, every registered person is entitled to take the credit of eligible input tax, as self-assessed in his return. The amount so claimed shall be credited on a provisional basis to his electronic credit ledger. But, this credit can be utilized only for payment of self-assessed out-put tax as per the return.

19. While Section 41 deals with the claim of ITC and provisional acceptance, Section 16 deals with the eligibility and conditions for taking ITC. Under Section 16 (1), every registered person shall be entitled to take credit of input tax charged on any supply of goods or services, which are used or intended to be used in the course of his business. The amount should be credited to the electronic credit ledger of such a person. But, the entitlement to take credit of input tax is subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49.

20. Sub-section (2) of Section 16 lays down four conditions subject to which a registered person will be entitled to the credit of any input tax. These conditions are (i) he should be in possession of a tax invoice or debit note issued by a supplier registered under the Act; (ii) he should have received the goods or services; (iii) the tax charged in respect of such supply should have been actually paid to the Government, either in cash or through utilisation of ITC; and (iv) he should have filed the return under Section 39.

21. Section 49 of the Act, which deals with payment of tax, also speaks about the manner in which ITC shall be credited. Sub-section (2) of Section 49 stipulates that the input tax credit as self-assessed in the return of a registered person should be credited to his electronic credit ledger in accordance with Section 41. The amount available in the electronic credit ledger may be used by virtue of Sub-section (4) of Section 49, for making any payment towards output tax under the Act.

22. Thus, the broad scheme of Section 39 which deals with the filing of returns, Section 41 which deals with the claim of ITC and its provisional acceptance, Section 16 which deals with the conditions and eligibility for taking ITC and Section 49 which deals with payment of tax, make it clear that the moment all the four conditions stipulated in Sub-section (2) of Section 16 are complied with, a person becomes entitle to take credit of ITC. Once a person takes credit of ITC, the amount gets credited on a provisional basis to his electronic credit ledger under Section 41 (1).

23. In other words, Section 16 (2) makes a registered person entitled to take credit of input tax. Section 41 (1) provides for a credit entry to be made on a provisional basis in the electronic credit ledger. But, the time at which this credit is made under Section 41 (1) is important. Section 41 reads as follows:

"41. *Claim of input tax credit and provisional acceptance thereof*.— (1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.

(2) The credit referred to in sub-section (1) shall be utilized only for payment of self-assessed

output tax as per the return referred to in the said sub-section."

24. It is seen from Section 41 (1) that a person gets credited with the input tax, in his electronic credit ledger, only upon his filing of the return on self-assessment basis. Till a return is filed, no credit becomes available to his electronic credit ledger.

25. It is only after a credit becomes available in the electronic credit ledger that the utilization of the same for payment of self-assessed out-put tax, arises under Section 41 (2).

26. Thus, the scheme of the Act makes a distinction between (i) the entitlement to take credit which comes first; (ii) the actual entry of credit in the electronic credit ledger, which comes next; and (iii) the actual payment from out of the credit, which comes last.

27. There can be no doubt about the fact that **even in respect of the input tax credit available in the electronic credit ledger, there is a necessity to make payment.** Section 41(2) talks about utilization of the credit available in the electronic credit ledger, for payment of the self- assessed output tax. Section 49(2) also confirms the stage at which a credit entry is made and Section 49(4) enables a registered person to make payment from out of the credit so available in the electronic credit ledger. Therefore, for finding an answer to the dispute on hand, **one must find out (i) when a credit entry is entered in the electronic credit ledger of the registered person; and (ii) when payment out of the same is made in lieu of cash.** Once it is statutorily prescribed that payment can be made either by way of cash or from out of the credit available in the electronic credit ledger, the date of payment in respect of both assumes significance for determining the liability to pay interest.

Wording of section 50

28. Having thus seen the scheme of Sections 39, 41, 16 and 49, let us now take a look at Section 50 about which present dispute revolves, which reads as under:

50. *Interest on delayed payment of tax.*—(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made there under, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

(3) A taxable person who makes an 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, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council."

29. It is seen from Sub-section (1) of Section 50 that the liability to pay interest arises automatically, when a person who is liable to pay tax, fails to pay the tax to the Government within the period prescribed. The liability to pay interest is in respect of the period for which the tax remains unpaid. In fact, the liability to pay interest under Section 50 (1) arises even without any assessment, as the person is required to pay such interest "**on his own**".

30. While Sub-Section (1) of Section 50 speaks about the liability to pay interest under one contingency, viz., the failure to pay tax within the period prescribed, Sub-Section (3) of Section 50 speaks about the liability to pay interest under a different contingency. Whenever an undue or excess claim of ITC is made or whenever an undue or excess reduction in out-put tax liability is made, a liability to pay interest

arises under Sub-section (3). The words "on his own" used in Sub-section (1), are not used in Sub-section (3) of Section 50.

31. Therefore, it is clear that the liability to pay interest under Section 50 (1) is self-imposed and also automatic, without any determination by any one. Hence, the stand taken by the department that the liability is compensatory in nature, appears to be correct.

32. Once it is clear that the liability to pay interest arises for non-payment within the period prescribed, we should see; (i) what is the period prescribed for payment of tax and (ii) the mode of such payment. Under Section 39 (7), every registered person (other than an Input Service Distributor or a Non-resident taxable person or a person paying tax under Sections 10/51/52) is obliged to pay to the Government, the tax due as per such return, not later than the date on which he is required to furnish such return. Sub-sections (1) and (7) of Section 39 read as follows:

"39. *Furnishing of Returns.*—(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form, manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed on or before the twentieth day of the month succeeding such calendar month or part thereof.

(2) to (6)**

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(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.

(8) to (10)**

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33. Therefore, the period prescribed for payment of tax in respect of every month is on or before the 20th day of the succeeding calendar month.

34. The mode of payment is stipulated in Section 49. Section 49 reads as follows:

"49. *Payment of tax, interest, penalty and other amounts.*—(1) Every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking or by using credit or debit cards or National Electronic Fund Transfer or Real Time Gross Settlement or by such other mode and subject to such conditions and restrictions as may be prescribed, shall be credited to the electronic cash ledger of such person to be maintained in such manner as may be prescribed.

(2) The input tax credit as self-assessed in the return of a registered person shall be credited to his electronic credit ledger, in accordance with section 41, to be maintained in such manner as may be prescribed.

(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.

(4) The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act, 2017 (Act No.13 of 2017) in such manner and subject to such conditions and within such time as may be prescribed.

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of,—

- (a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union Territory tax, in that order;
- (b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;
- (c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax;
- (d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax;
- (e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and
- (f) the State tax or Union territory tax shall not be utilised towards payment of central tax.

(6) The balance in the electronic cash ledger or electronic credit ledger after payment of tax, interest, penalty, fee or any other amount payable under this Act or the rules made thereunder may be refunded in accordance with the provisions of section 54.

(7) All liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

(8) Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely:—

- (a) self-assessed tax, and other dues related to returns of previous tax periods;
- (b) self-assessed tax, and other dues related to the return of the current tax period;
- (c) any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.

(9) Every person who has paid the tax on goods or services or both under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such tax to the recipient of such goods or services or both.

Explanation:- For the purposes of this section,-

- (a) the date of credit to the account of the Government in the authorised bank shall be deemed to be the date of deposit in the electronic cash ledger;
- (b) the expression,—
 - (i) "tax dues" means the tax payable under this Act and does not include interest, fee and penalty; and
 - (ii) "other dues" means interest, penalty, fee or any other amount payable under this Act or the rules made thereunder."

35. It is seen from Sub-section (2) of Section 49 that a credit entry is made in the electronic credit ledger of a registered person, only when the ITC, as self-assessed, is found in the return of a registered person. After a credit entry is made in the electronic credit ledger, the same becomes available for making payment. This is clear from Sub-section (3) of Section 49. If after payment, a balance is still available in

the electronic credit ledger, the same is liable to be refunded in accordance with Section 54.

36. Therefore, in the entire scheme of the Act three things are of importance. They are; (i) the entitlement of a person to take credit of eligible in-put tax, as assessed in his return; (ii) the credit of such eligible in-put tax in his electronic credit ledger on a provisional basis under Section 41 (1) and on a regular basis under Section 49 (2); and (iii) the utilization of credit so available in the electronic credit ledger for making payment of tax, interest and penalty etc., under Section 49 (3).

37. In other words, **until a return is filed as self-assessed, no entitlement to credit and no actual entry of credit in the electronic credit ledger takes place.** As a consequence, no payment can be made from out of such a credit entry. **It is true that the tax paid on the inputs charged on any supply of goods and/services, is always available. But, it is available in the air or cloud. Just as information is available in the server and it gets displayed on the screens of our computers only after connectivity is established, the tax already paid on the inputs, is available in the cloud. Such tax becomes an in-put tax credit only when a claim is made in the returns filed as self-assessed. It is only after a claim is made in the return that the same gets credited in the electronic credit ledger. It is only after a credit is entered in the electronic credit ledger that payment could be made, even though the payment is only by way of paper entries.**

38. If we take a common example of banking transactions, this can be illustrated much better. **An amount available in the account of a person, though available with the bank itself, is not taken to be the money available for the benefit of the bank. Money available with the bank is different from money available for the bank till the bank is allowed to appropriate it to itself.** Similarly, the tax already paid on the in-puts of supplies of goods or services, available somewhere in the air, should be tapped and brought in the form of a credit entry into the electronic credit ledger and payment has to be made from out of the same. If no payment is made, the mere availability of the same, there in the cloud, will not tantamount to actual payment.

39. Admittedly, the petitioner filed returns belatedly, for whatever reasons. As a consequence, the payment of the tax liability, partly in cash and partly in the form of claim for ITC was made beyond the period prescribed. Therefore, the liability to pay interest under Section 50 (1) arose automatically. The petitioner cannot, therefore, escape from this liability.

40. Let us look at it from another angle. Suppose a registered person under the Act purchases goods, which have suffered tax, to be used as inputs in the goods to be sold by him. Let us assume that the purchase is made in January and hence the same is reflected in the return filed by February 20. While filing the return in February, the dealer could have taken credit and it is possible that the credit is available in the electronic credit ledger for the month of February. If after some kind of processing, the goods are sold in March, the output tax becomes payable while filing the return by April 20. This payment can be either by way of cash or by way of adjustment against the claim for ITC. The payment is made by way of cheque in the case of the former and by way of a claim made in the return by way of an entry. Only when the payment is so made, the Government gets a right over the money available in the ledger. Since ownership of such money is with the dealer till the time of actual payment, the Government become entitled to interest upto the date of their entitlement to appropriate it.

41. Mr. Gandra Mohan Rao, learned counsel relied upon an approval made in principle by the GST Council for the amendment of the Act. The Press release of the Ministry of Finance in this regard reads as follows:

"The GST Council in its 31st meeting held today at New Delhi gave in principle approval to the following amendments in the GST Acts:

1. Creation of a Centralised Appellate Authority for Advance Ruling (AAAR) to deal with cases of conflicting decisions by two or more State Appellate Advance Ruling Authorities on the same issue.
2. Amendment of section 50 of the CGST Act to provide that interest should be charged only on the net tax liability of the taxpayer, after taking into account the admissible input tax credit, i.e., interest would be leviable only on the amount payable through the electronic cash ledger.

The above recommendations of the Council will be made effective only after the necessary amendments in the GST Acts are carried out."

42. But, unfortunately, the recommendations of the GST Council are still on paper. Therefore, we cannot interpret Section 50 in the light of the proposed amendment.

43. The learned counsel for the petitioner relied upon two decisions of the Gujarat High Court, one in *State of Gujarat v. Dashmesh Hydraulic Machinery*, dated 19.01.2015, and another in *State of Gujarat v. Nishi Communication*, dated 29.01.2015.

44. But, both the above decisions arose out of Gujarat Value Added Tax Act. The VAT regime and the GST regime differ from each other substantially. Therefore, these decisions do not go to the rescue of the petitioner.

45. In view of the above, the claim made by the respondents for interest on the ITC portion of the tax cannot be found fault with. Hence, the Writ Petition is dismissed. However, in the circumstances, there shall be no order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending in the writ petition, shall stand closed.

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