

Recipient cannot be asked to reverse ITC in case of mismatch in returns without investigation on the supplier – Calcutta HC

7 August 2023



Summary

The Calcutta High Court (HC) has held that the notice issued for demanding the reversal of the input tax credit (ITC) to the recipient in case of a mismatch of the ITC in returns without investigating on the supplier was arbitrary and not sustainable. The HC observed that the authorities did not take any action against the supplier and ignored the tax invoices and bank statement produced by the appellant evidencing payment to the supplier. The HC emphasised on the need for the authorities to act against the selling dealer before directing the buyer to reverse the ITC and set aside the order passed by the authorities. The HC further directed the authorities to proceed against such supplier, and only in exceptional circumstances, as clarified by the Board, proceedings can be initiated against the appellant (i.e., the recipient).

Facts of the case:

- Suncraft Energy Private Limited ('the appellant/recipient') had taken installation and commission services from the supplier and made tax payments to them.
- During scrutiny of the returns filed by the appellant u/s 61 of the CGST Act, the authorities found that the appellant had availed credit of invoices that were not reflected in the GSTR 2A.
- Therefore, a show cause notice (SCN) was issued to the appellant, proposing a demand as to the excess ITC claimed by the appellant for Financial Year 2017-18 on the basis of the difference of the amount of the ITC in Form GSTR-2A and Form GSTR-3B with respect to the purchase transaction made by the appellant with the supplier.
- The SCN was adjudicated the demand for payment of tax, along with applicable interest and penalty confirmed u/s 73(10) of the CGST Act.
- Aggrieved by the order, the appellant filed a writ petition before the Calcutta HC, which was disposed off by the single bench of the HC, and directed the appellant to file the statutory appeal before the appellate authority.
- Aggrieved by the order of the single bench, the appellant filed an appeal before the division bench of the Calcutta HC.

Appellant's contentions:

- The appellant contended that it had fulfilled all the conditions for the availment of the ITC as enumerated u/s 16(2) of the West Bengal Goods and Services Tax Act, 2017 (WBGST Act), and it is in possession of the tax invoice and had made payment to the supplier.
- The appellant placed reliance on the decision of the SC in the case of Bharti Airtel Ltd, wherein, it was held that Form GSTR 2A is a facilitator for self-

assessment and it should not impact ITC availed.

- The appellant also referred to the press release issued for taxpayer facilitation by the Board, wherein, it was clarified that the ITC can be availed based on self-assessment in GSTR 3B, and reversal of the ITC from buyers is an option in exceptional cases, such as missing dealers, supplier closure or the supplier not having adequate assets but not a default action.

Calcutta High Court observations and order [MAT 1218 of 2023 dated 2 August 2023]:

- **GSTR-2A acts as a facilitation for self-assessment of ITC, does not impact credit claim:** The HC stated that in terms of the aforesaid mentioned press release and case law (supra), Form GSTR-2A is just a facilitator for self-assessment of the ITC and does not impact the taxpayer's ability to claim the credit, and the buyer's ITC should not be automatically reversed due to the seller's non-payment of tax.
- **All conditions fulfilled by appellant:** The notice does not allege that the appellant was not in possession of a tax invoice issued by the supplier registered under the Act. There is no denial of the fact that the appellant has received the goods or services or both. Further, the appellant had also made payment to the supplier, which was substantiated by producing the tax invoice and the bank statement.
- **No enquiry conducted on supplier:** The HC observed that the authorities had not conducted any enquiry on the supplier inspite of specific clarification that Form GSTR-2A is in the nature of taxpayer facilitation and does not impact the ITC availability on self-assessment basis. The authorities did not take any action against the supplier and also ignored the tax invoices and bank statement produced by the appellant. Therefore, the notice issued by the authorities was arbitrary.

- **Investigation on supplier mandatory:** The HC emphasised on the need for the authorities to act against the selling dealer before directing the buyer to reverse the ITC. Unless the authority is able to bring out an exceptional case where there has been collusion between the appellant and the supplier, or where the supplier is missing or has closed down its business or does not have any assets and such other contingencies, the authorities cannot straight away demand reversal of the ITC availed by the appellant. Therefore, the SCN issued on the recipient of a service due to a mismatch in GSTR 2A and GSTR 3B cannot be sustained without conducting an investigation on the supplier.
- **Impugned order set aside:** The HC allowed the appeal and set aside the final order with a direction to the authorities to first proceed against the supplier. Only under exceptional circumstance, as clarified in the press release (supra) issued by the Board, proceedings can be initiated against the appellant.

Our comments

On a similar issue, under the erstwhile VAT regime, the Delhi HC, in the case of Arise India Limited, had held that the remedy for the department would be to proceed against a defaulting selling dealer to recover such tax and not denying the ITC to the purchasing dealer. The decision of the Delhi High Court was further upheld by the Supreme Court.

Even under the GST regime earlier, the Madras HC, in the case of D. Y. Beathel Enterprises, had held that the purchaser/buyer cannot be asked to reverse the ITC availed when there is a default on the part of the seller to discharge his tax liability to the government. The HC stated that strict action should have been taken against the seller and recovery proceedings should be initiated by the Revenue before asking the purchaser to reverse the ITC.

Even the Karnataka HC, in the case of Simplex Infrastructures Ltd., had held that the ITC cannot be denied in the hands of the purchasing dealer merely on the ground that the selling dealer has not discharged his/her VAT liability.

The present ruling by the Calcutta HC is in line with the above rulings and will provide a big relief to taxpayers to corroborate the availment of the ITC in cases of mismatch in the ITC in GSTR-3B vis-a-vis GSTR-2A basis documentary evidence.

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