

ITC ineligible if supplier does not pay tax to government despite recovering from recipient – Patna HC

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Summary

The Patna High Court (HC) denied the eligibility of input tax credit (ITC) to the buyer where the supplier fails to remit tax to the government despite recovering from the buyer. The HC emphasised that mere documentation of tax invoices, bank payments, and proof of goods transportation does not absolve the buyer from demonstrating that the tax has actually been paid to the government. Section 16(2)(c) of the Central Goods and Services Tax Act (CGST Act) imposes a mandatory condition, the non-fulfilment of which would render ITC ineligible.

Facts of the case

- M/s. Aastha Enterprises (the petitioner), being the purchasing dealer, fulfilled its tax liability to the selling dealer, who, in turn, had failed to deposit the same to the government.
- The petitioner filed a writ petition to question the eligibility of the ITC, which is evidenced by the invoice and other documentary evidence, and insisted on taking action against the selling dealer who defaulted on tax payment in terms of provisions of the GST Act.

Patna HC observations and judgement [Civil Writ Jurisdiction Case No. 10395/2023; Order dated 18 August 2023]

- **Condition for availing ITC must be satisfied in toto:** The HC opined that the registered persons are entitled to avail ITC with respect to goods, services, or both, which are used or intended to be used in the furtherance of business, subject to the fulfilment of specified conditions together and not individually. Therefore, the HC was of the view that the entitlement of the ITC shall be available to the purchasing dealer only upon the payment of tax to the government, along with fulfilment of other conditions such as the existence of a tax invoice, proof of receipt of goods or services, or both.

- **Burden of proof cast on the purchasing dealer to prove that tax has been deposited to the government:** Drawing reliance from the Supreme Court's (SC) judgement in *M/s Ecom Gill Coffee Trading Private Limited*, the HC asserted that the burden of proof of establishing the genuineness of the transaction rests upon the purchasing dealer. Further, merely furnishing the details of the tax invoice would not suffice to claim the ITC. Basis the above, the HC held that merely producing the tax invoices, bank account details, and documents proving transportation of goods does not absolve the purchasing dealer of establishing that tax has been actually paid to the government, which is a mandatory condition under Section 16(2)(c) of the CGST Act for being entitled to the ITC claim.
- **ITC is a benefit or concession conferred only if prescribed conditions are satisfied:** The HC observed that the ITC is a benefit introduced to avoid tax cascading. However, such statutory benefit is available only when the conditions are fulfilled, else no benefit can flow to the claimant. Moreover, the credit of the ITC in the ledger maintained can only arise when the tax is paid to the government.

Considering this, the HC asserted that since the tax has not been paid to the government, the tax liability is not satisfied, and the claim of the ITC fails.

entitlement of the ITC to the purchasing dealer in the absence of payment to the government, despite the collection of such tax from such purchasing dealer.

- **Existence of recovery provisions does not absolve the purchasing dealer liability:** The HC stated that only because the machinery provisions provide for recovery of the amount from the selling dealer, it does not expunge the tax liability saddled upon the purchasing dealer. Accordingly, the HC denied the

Our comments

This issue was prominently deliberated upon in the erstwhile tax laws and has continued to persist under GST.

Earlier, the Delhi HC, in the case of Quest Merchandising India Private Limited, had read down the provision of the Delhi VAT Act, which precluded the purchasing dealer from availing ITC in the event the selling dealer had failed to deposit the tax despite being paid by the purchasing dealer. In appeal, the SC had affirmed the judgement of the Delhi HC. The apex court had taken a similar position in the case of Arise India Limited. The Madras HC, in Sri Vinayaga Agencies under Tamil Nadu VAT Act and in M/s. D.Y. Beathel Enterprises under GST, held a similar stance.

Recently, the Calcutta HC, in the case of Suncraft Energy Private Limited, had overturned the order of the adjudicating authority demanding reversal of excess ITC availed and clarified that the ITC cannot be denied without a thorough investigation of the supplier.

However, the Madras HC, in the case of Pinstar Automotive India Private Limited, had strictly interpreted Section 16(2)(c) of the CGST Act and ruled that the mandate is upon the claimant to ensure compliance with the provision, failing which the purchasing dealer is thwarted from availing the ITC.

The purchasing dealer has been saddled with the impossible burden of proof to ensure that the tax collected is paid to the government, without a mechanism to determine the same. The condition places the purchasing dealer, who has duly paid the tax, at par with the violating supplying dealer, and takes away the genuine claim of the ITC despite availability of the mechanism with the government to recover the tax duly paid or acting upon the defaulter dealer.

It will be interesting to note if the contrasting deliberations on this issue will finally square up before the SC.

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