

Preliminary action against suppliers for non-payment of GST [breach of Section 16(2)(c)]

M/s Lokenath Construction Private Limited v. Tax/Revenue Government of West Bengal and Others¹

The issue of denial of Input Tax Credit ('ITC') to the recipient when the supplier has not paid tax to the Government despite collecting it from the recipient, is a contentious issue under the GST regime.

Various High Courts have delivered divergent rulings on this matter. Recently, in the case of ***M/s. Lokenath Construction Private Limited*** ('the Appellant'), the Calcutta High Court ('the Court') held that the Revenue has erred in issuing an order to the Appellant for automatic reversal of ITC while not taking any action against the supplier first for non-payment of tax by him to the Government.

Facts of the case

- A Show Cause Notice ('SCN') was issued to the Appellant alleging utilisation of ITC in contravention of Section 16(2)(c) of the CGST Act and failure to submit evidence substantiating payment of tax by supplier to the Government.
- The Appellant submitted to the Revenue, valid purchase invoices, proof of payment of tax to supplier and certificates issued by Chartered

Accountant evidencing payment of tax by supplier to Government.

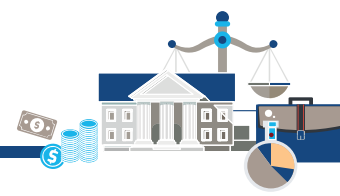
- Further, the Appellant filed a writ petition on the ground that the said SCN is without jurisdiction, more particularly in the light of the earlier decision of this Court in case of ***Suncraft Energy Private Limited v. Assistant Commissioner of State Tax²***, as it has directly denied ITC to it without doing any verification at the supplier's end.
- Despite pendency of the writ, the Revenue adjudicated the SCN and passed order confirming the demand as alleged in the SCN.

Discussion and Findings

- The Revenue admitted the fact that the Appellant has submitted two certificates issued by the Chartered Accountants declaring that the suppliers had discharged tax liability in their corresponding GSTR-3B for the relevant periods.
- The said certificates were rejected observing some variation in the details without seeking any clarification and providing an opportunity of being heard to the Appellant.
- The Court relied upon its earlier judgement in the case of ***Suncraft Energy (Supra)*** wherein it was

¹2024-VIL-432-CAL

²2023-VIL-487-CAL



held that the action shall first be taken against the supplier and only under exceptional circumstances as clarified in the Press Release issued by the Central Board of Indirect Taxes and Customs ('CBIC')³, i.e. missing dealer, closure of business by supplier or supplier not having adequate assets etc. the proceedings against the buyer can be initiated.

- Hence the action of penalizing the Appellant and denying him ITC without initiating any recovery action against the supplier would be arbitrary, illegal and without jurisdiction.

Judgement

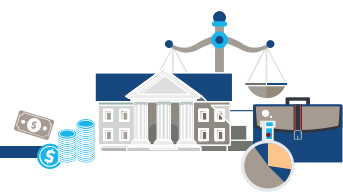
The Court set aside, both the Order and the SCN, and instructed Revenue to first proceed against the supplier. The Court emphasized that the proceedings against the Appellant can be initiated only in exceptional situations as per the CBIC clarification.

Dhruva Comments

The Court applied the CBIC clarification in spirit and set-out the ratio that a direct action against the recipient taxpayer is arbitrary and without jurisdiction. This shall support the recipient taxpayers wherein the ITC denial proceedings gets initiated against them directly.

Importantly, the larger and critical issue over availability of ITC even if the supplier does not pay the requisite GST has not been answered by the Court and the same still remain the key concerning issue for the taxpayers at large.

³Press release dated May 4, 2018



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