

HIGH COURT OF TRIPURA
AGARTALA

WP (C) 399 OF 2022

M/S SR Constructions Vrs. The Union of India & Ors.

Present:

For the petitioner(s) : Mr. T.K. Deb, Advocate.
Mr. R. Tangri, Advocate.

For the respondent (s) : Mr. B. Majumder, DySGI.
Mr. P.Datta, Advocate.

REPORTING : YES

HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR.JUSTICE ARINDAM LODH

04.04.2023

(T.Amarnath Goud,ACJ)

Order

By way of filing the writ petition, the petitioner has challenged the legality and validity of the order dated 01.02.2022, passed by the respondent no.3, the Additional Commissioner (Appeals), CGST, Central Excise and Customs, Guwahati. i.e. the appellate authority.

Fact of the case is that the petitioner is a construction company. They have a works contract agreement with the M/s Hotel Polo Pvt. Ltd. and constructed a hotel at Agartala. In the process of construction they procured materials and also took the services of Sub-contractors. For the purpose of providing inward output service of works contract service, the petitioner receives inward supply of various goods and services on payment of GST. The returns were also filed and the taxes were paid. So, in the process of taxes he is entitled for Input Tax Credit (ITC) and accordingly amounts have been remitted by the Assessee. But, in that process, the respondents have raised Input Tax Credit against the petitioner under Section 74(1) of CGST Act. It is the further case of the petitioner that the demand on the ground that such ITC availed on works contract service for supply of construction of an immovable property was in violation of

Section 17(5) of CGST Act is incorrect and the respondents are not entitled to collect the taxes under the Input Tax Credit since the credit has to be given under the Act. A Show Cause Notice was issued to him on 30.09.2019. He has filed explanation and orders have been passed. Aggrieved thereby he has also preferred an appeal before the respondent no.3 whereby the appellate authority vide Order-in-Appeal No.07/GHY (A)/Addl. Commr/CGST-AGT/2022 dated 01.02.2022, confirmed the order dated 13.10.2020, passed by the adjudicating authority i.e. respondent no.4. Since no remedy has been addressed to him by the respondents, the present writ petition is filed.

Heard Mr. Rahul Tangri, learned counsel appearing for the petitioner as well as Mr. B. Majumder, learned DySGI and Mr. P. Datta, learned counsel appearing for the respondents.

Mr. Tangri, learned counsel appearing for the petitioner contended that the appeal against order dated 13.10.2020 has been rejected by the appellate authority but in the impugned order it is nowhere stated any reason so as to hold that the petitioner is not entitled to avail ITC on works contract service. Rather, it is merely observed that '*ITC on works contract service i.e. sub-contractor will charge GST in the tax invoice raised on the main contractor. The main contractor will be entitled to take ITC on the tax invoice raised by his sub-contractor. Therefore, ITC is not applicable to the petitioner in respect of subject works contract services for construction of a hotel building and amenity block*'. He submitted that such observation is devoid of any logic. Further, it is submitted that a demand notice cannot be confirmed upon the assessee, without specifying the charges and notifying the exact statutory provisions, based on which such demand is proposed. The respondents have proposed to deny ITC amounting to Rs.1,42,33,194/-, availed on works contract services for

construction of immovable property, on the ground that such availment is in violation of 17(5)(c) of the CGST Act.

Mr. P. Datta, learned counsel appearing for the respondent nos. 2, 3 & 4 submitted that since there was nothing unlawful in the impugned adjudication order, the appellate authority has agreed with the finding of the lower adjudicating authority. He further submitted that a clear reading of the impugned adjudication order reveals that in the impugned adjudication order the charges have been specifically put down and provisions have been clearly mentioned. Hence, the allegations are baseless. So, the action of the respondents Tax authorities is correct and the petitioner is liable to pay the amount demanded under the Input Tax Credit.

It is seen from the record that the petitioner has already paid substantial amount as per Section 17(5)(c) of the Act. Section 17 of CGST Act, 2017 reads as under:

Section 17. Apportionment of credit and blocked credits.-- (1) *Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.*

(2) *Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.*

(3) *The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.*

(4) *A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply with the provisions of sub-section (2), or avail of, every month, an amount equal to fifty per cent of the eligible input tax*

credit on inputs, capital goods and input services in that month and the rest shall lapse:

Provided that the option once exercised shall not be withdrawn during the remaining part of the financial year:

Provided further that the restriction of fifty per cent shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number.

(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such vehicles or conveyances ; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

(i) for making the following taxable supplies, namely:--

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels;

or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa);

Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft, or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;.....”

In view of the above, it is clear that the petitioner has fulfilled all the conditions of work contracts as he is providing work contract services under a contract for construction of building of a Hotel wherein transfer of property in goods is involved in the execution of such contract. The Hotel Polo Pvt. Ltd. is immovable property. So, the petitioner has been providing work contract services to the owner of the hotel and not for its own. Further, in providing taxable work contract services for the said construction of Hotel Building, he is entitled to take Input Tax Credit on the Goods and Services being utilized for providing the taxable work contract services.

So, in this case, we find that the petitioner do not fall within the definition of Section 17(5)(c) of the CGST At,2017. The demand raised on 30.09.2019 and the penalty imposed under Section 74(1) of the CGST Act,2017 is *ultra vires*, contrary to law and thus, the impugned order dated 01.02.2022, passed by the respondent no.3, the appellate authority affirming the order passed by the adjudicating authority on 13.10.2020, is liable to be set aside and quashed.

Accordingly, the impugned order dated 01.02.2022 stands set aside and quashed.

The writ petition stands allowed and disposed of.

JUDGE

CHIEF JUSTICE (ACTING)

