

Chief Justice's Court**Case :-** WRIT TAX No. - 859 of 2023**Petitioner :-** M/S Tikona Infinet Private Limited**Respondent :-** State of U.P. and Another**Counsel for Petitioner :-** Nishant Mishra, Vedika Nath**Counsel for Respondent :-** C.S.C.**Hon'ble Pritinker Diwaker, Chief Justice****Hon'ble Ashutosh Srivastava, J.**

Heard Sri Nishant Mishra, learned counsel for the petitioner and Sri Ankur Agarwal, learned counsel for the Revenue.

The writ petition has been filed questioning the legality, propriety and correctness of the order dated 17.04.2023 passed by the Deputy Commissioner, State Tax, Respondent No.2, whereby and whereunder the demand and recovery of input tax credit (ITC) for Rs.3,13,68,9997/- availed by the petitioner during the period September, 2017 to November, 2017 has been confirmed on the ground that the transfer of the said ITC has been accepted and availed by the petitioner through Form GST-33 instead of GST ITC-02.

The petitioner is a registered Company engaged in providing internet service across India from various State including the State of U.P. The petitioner entered into a Business Transfer Agreement on 17.08.2017 with another Company i.e. M/s Tikona Digital Network Pvt. Ltd. under which the business was transferred to the petitioner. M/s Tikona Digital Network (TDA) had accumulated ITS balance of more than Rs.3,1313,68,997/- which was unutilized. The petitioner being entitled to transfer the ITC remaining unutilized under Section 18(3) of the GST Act made attempt to transfer the same as per the procedure prescribed under Rule 41 of the CGST Rules, 2017. The Rules provide that the Transferor shall file GST ITC-02 electronically on common portal along with a request for transfer of ITC remaining unutilized in his Electronic Credit Ledger (ECL) to the transferee. It is the case of the petitioner that functionality for filing Form IT-02 was not available on the common portal.

The non availability was communicated to the jurisdictional Assessing Authority. No response was received. Faced with

serious working capital issues, the petitioner manually accepted and availed the ITC of Rs.3,13,68,997/-. After a lapse of five years, the petitioner was served with a show cause notice dated 28.2.2023 requiring the petitioner to serve the differential ITC of Rs.2,88,35,905.60/- along with interest and penalty. The total ITC available in Form GSTR-2A is Rs.2,22,24,921.08/- whereas petitioner availed the ITC of Rs.5,10,60,826.68/-. The petitioner submitted a detailed reply against the show cause with a prayer to withdraw the show cause notice. It is alleged that the Respondent No. 2 without considering the reply of the petitioner has proceeded to pass the impugned order dated 17.04.2023 confirming the demand.

We have heard learned counsel for the petitioner and have gone through the reply dated 13.03.2023 submitted by the petitioner to the show cause as also the impugned order dated 17.04.2023 passed by the Respondent No.2. Prima-facie, we find that the objections filed by the petitioner has not been considered by the respondent No. 2 and the order has been passed on technicalities.

Shri Ankur Agarwal, learned counsel appearing for the Respondent No.2 has vehemently argued in support of the impugned order. He submits that the averment of the petitioner to the effect that the objections have not been considered is ill founded inasmuch as the impugned order records that the objections have been filed and despite opportunity having been afforded to the petitioner for personal hearing, the same was not availed by the petitioner. No irregularity or illegality can be attributable to the impugned order and the same is liable to be sustained.

Be that as it may, we find that the petitioner has been non suited on the ground that Form ITC-02 for transfer of input tax credit was not available on the GST Portal which was in nascent stage during the initial months after its implementation on 01.07.2017 and it was incumbent upon the petitioner to have raised a proper grievance on the GST portal help-desk and ought to have waited for the relevant Form to go live on the GST portal instead of making illegal adjustment by use of the Form GSTR-3B of the transferor and the transferee company and mere shortage of working capital cannot be an excuse to bypass the legal procedure laid down under the law.

We are of the view that the stand of the Respondent No.2, for rejecting the claim of the petitioner in the wake of the admitted fact that the GST common portal was not online cannot be justified. We consequently set aside the order dated 17.04.2023 with

liberty to the Respondent No.2 to pass fresh order taking into consideration the objections of the petitioner and also affording it opportunity of hearing, strictly in accordance with law.

The writ petition is accordingly ***disposed of***.

Needless to say the petitioner to cooperate in the proceedings and not take unnecessary adjournments.

Order Date :- 25.7.2023

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(Ashutosh Srivastava, J) (Pritinker Diwaker, CJ)