

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19457 of 2023

=====
TIKONA INFINET PRIVATE LIMITED

Versus

STATE OF GUJARAT
=====

Appearance:

MR PRASAD PARANJAPE, ADVOCATE with

MR DHAVAL SHAH(2354) for the Petitioner(s) No. 1

for the Respondent(s) No. 2,3

MR TRUPESH KATHIRIYA, AGP for the Respondent - State
=====

CORAM:HONOURABLE MR. JUSTICE BIREN VAISHNAV

and

HONOURABLE MRS. JUSTICE MAUNA M. BHATT

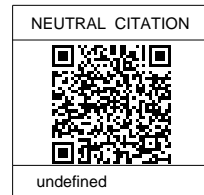
Date : 08/11/2023

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. Heard learned advocate Mr. Prasad Paranjape with learned advocate Mr. Dhaval Shah for the petitioner and learned Assistant Government Pleader Mr. Trupesh Kathiriya for the respondent – State who appeared on advance copy.

2. Challenge in this petition is to the show-cause notice dated 29.09.2023 issued by the respondents. Shortly stated, it is the case of the petitioner that Tikona Infinet Private Limited is a transferee company which had pursuant to Business Transfer Agreement with one Tikona Digital Networks Private Limited as per Section 18(3) of the Central Goods and Service Tax Act, as a registered company, allowed to transfer the



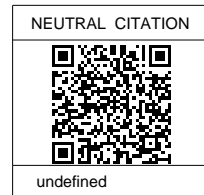
business and the Input Tax Credit lying un-utilized in its Electronic Credit Ledger.

3. Learned advocate Mr. Paranjape for the petitioner submitted that as per Rule 41(1) of the Central Goods and Services Rules a registered person intending to transfer the credit is required to file Form GST ITC-02 on the common portal for transferring the said input tax credit to the transferee. It had been pointed out to the Central Tax Agency that Form ITC-02 was not available on the GST Portal for filing and hence were unable to comply with the requirement of filing the said form. Having failed to do so, the petitioner did so separately manually, as is shown by the learned advocate for the petitioner from a letter to the respondents dated 12.02.2018.

3.1 Learned advocate Mr. Paranjape for the petitioner relied upon an order passed by the High Court of Allahabad in the case of the petitioner itself which dealt with the similar issue of un-utilized Input Tax Credit and an order passed subsequent to the show-cause notice on similar lines.

4. Learned Assistant Government Pleader Mr. Trupesh Kathiriya for the respondent would submit that presently the issue at large before the authorities in light of the show-cause notice issued to the petitioner.

5. Having considered the submissions made by the learned advocates for the respective parties. Essentially the case of the petitioner is that the show-cause notice is unwarranted

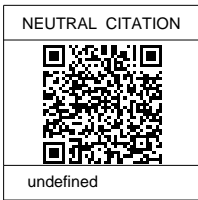


inasmuch as but for the non-availability of Form ITC-02 under GST Portal, it was only possible for the petitioner to file the Form manually for transferring the Input Tax Credit to the transferee and therefore the show-cause notice is misconceived. We would go to the show-cause notice and the letter of petitioner at Page No. 73 to indicate the discrepancies in the figures.

6. Considering the submissions made by the learned advocates for the respective parties and having perused the show-cause notice dated 29.09.2023, the petitioner is directed to file a response to the show-cause notice within 2 weeks from the date of receipt of copy of this Court. As soon as the petitioner responds to the show-cause notice, the respondents are directed to consider the case of the petitioner in light of its own case which was decided by the Division Bench of Allahabad High Court in Writ Tax No. 859 of 2023. Considering the identical issue where the Division Bench of the Allahabad High Court held as under:-

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

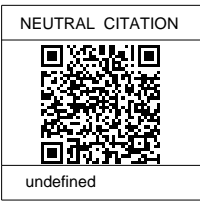
The writ petition has been filed questioning the legality, propriety and correctness of the order dated 17.04.2023 passed by the Deputy Commissioner, State Tax, Respondent No.2, whereby and whereunder the demand and recovery of input tax credit (ITC) for Rs.3,13,68,9997/- availed by the petitioner



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. underwhich 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 unutilised 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 tranferee. It is the case of the petitioner that functionality for filing Form IT-02 was not available on the common portal.

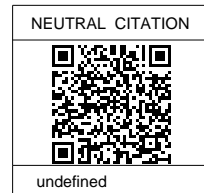
The non availability was communicated to the jurisdictional Assessing Authority. No



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.

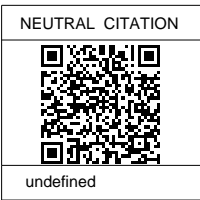
Shri Ankur Agarwal, learned counsel appearing for the Respondent No.2 has



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 side 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.”

7. The respondents are directed to consider the case of the petitioner in light of the decision passed by the Allahabad High Court and pass an appropriate order in accordance with law especially considering the findings of the Allahabad High Court as to non-availability of the Form ITC-02 on online portal of GST. Petition is disposed of.

8. Direct service is permitted.

(BIREN VAISHNAV, J)

(MAUNA M. BHATT,J)

SHRIJIT PILLAI