(C.R)

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 03RD DAY OF FEBRUARY 2020 / 14TH MAGHA, 1941

WP(C).No.35159 OF 2019(T)

PETITIONER/S:

M/S.PHOENIX RUBBERS, A 76, KINFRA IIT PARK, KORAYAR, KANJIKODE, PALAKKAD, REPRESENTED BY SAKKEER HUSSAIN, MANAGING PARTNER.

BY ADVS.
SRI.HARISANKAR V. MENON
SMT.MEERA V.MENON
SMT.K.KRISHNA

RESPONDENT/S:

1 THE COMMERCIAL TAX OFFICER, 1ST CIRCLE, STATE GST DEPARTMENT, PALAKKAD-678001.

2 THE COMMISSIONER OF STATE GST, TAX TOWERS, KILLIPPALAM, KARAMANA, THIRUVANANTHAPURAM-695002.

3 ADDL.R3.THE COMMISSIONER, OFFICE OF THE COMMISSIONER OF CENTRAL GST, CENTRAL EXCISE AND CUSTOMS, C.R.BUILDINGS, MANANCHIRA ROAD, KOZHIKODE-673 001.

4 ADDL.R4. THE SUPERINTENDENT PALAKKAD SOUTH RANGE, OFFICE OF THE SUPERINTENDENT, CENTRAL TAX AND CENTRAL EXCISE, C.R.BUILDING, P.B.NO.33, METTUPALAYAM STREET, PALAKKAD 678 001.

ADDL.R3 AND R4 ARE IMPLEADED AS PER ORDER DATED 21.01.2020 IN IA NO.3/2020 IN W.P.(C) 35159/2019. R3-4 BY SREELAL N. WARRIER, SC, CENTRAL BOARD OF EXCISE & AMP; CUSTOMS

OTHER PRESENT:

SMT.THUSHARA JAMES, GOVT.PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03.02.2020, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ALEXANDER THOMAS, J.

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W.P.(C).No. 35159 of 2019

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Dated this the 3rd day of February, 2020

J U D G M E N T

The prayers in the above Writ Petition (Civil) are as follows:

> *"(i) To quash Ext.P-3 order issued by 1st respondent by the issue of a writ of certiorari or such other writ or order or direction.*
>
> *ii) To grant the petitioner such other incidental reliefs including the cost of these proceedings."*

2. Heard Sri.Harisankar V.Menon, learned counsel appearing for the petitioner, Sri. Sreelal N.Warrier, learned Standing Counsel for the Central Board of Indirect Taxes, Government of India, appearing for additional respondents 3 & 4, and Dr.Thushara James, learned Government Pleader appearing for R-1 & R-2.

3. The factual aspects stated in this Writ Petition (Civil) are as follows:- That the petitioner is an assessee of goods and services tax on the roll of 4th respondent. That on account of financial crisis, the petitioner firm defaulted filing of returns from May, 2019 onwards. Thereupon, the 4th respondent had issued Ext.P-1 notice dated 13.1.2019 to the petitioner proposing to cancel the registration under Sec. 29(2)(c) of the CGST Act on account of the alleged non filing of the returns for a continuous six months' period. Thereafter, the 4th respondent has passed the impugned Ext.P-3 order ordering

the cancellation of registration of the petitioner firm under Sec. 29(2)(c) of the CGST Act. The petitioner would point out that the abovesaid provision contained in Sec. 29(2)(c) of the CGST Act provides cancellation of the registration only if there is continuous default of six months in filing the returns. The main contention urged by Sri.Harisankar V.Menon, learned counsel appearing for the petitioner is to the effect that though the 4th respondent found that as on the date of Ext.P-1 notice dated 13.11.2019 there were six months' continuous default on the part of the petitioner, that indeed there was only 5 months' continuous default and not the mandatory six months' continuous default in filing the returns as envisaged in Sec. 29(2)(c) of the CGST Act. Therefore, the impugned order is illegal and ultra vires and is liable to be interdicted by this Court. Further it is pointedly pointed out that the impugned Ext.P-3 order directing cancellation of the registration of the petitioner was rendered on 10.12.2019 and that on 10.12.2019, the petitioner had filed returns for the month of May, 2019 as can be seen from Ext.P-2 document.

4. Sec. 29(2) of the CGST Act provides as follows:

"Sec.29: Cancellation of registration.--(1)....

xxx xxx xxx

(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,--

(a) a registered person has contravened such provisions of the

Act or the rules made thereunder as may be prescribed; or

(b) a person paying tax under Section 10 has not furnished returns for three consecutive tax periods; or

(c) any registered person, other than a person specified in Clause (b), has not furnished returns for a continuous period of six months; or

(d) any person who has taken voluntary registration under sub-section (3) of Section 25 has not commenced business within six months from the date of registration; or

(e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts:

Provided that the proper officer shall not cancel the registration without giving the person an opportunity of being heard."

Rule 22 of the CGST Rules provides as follows:

***"Rule 22. Cancellation of registration.-(1) Where the proper officer** has reasons to believe that the registration of a person is liable to be cancelled under section 29, he shall issue a notice to such person in FORM GST REG-17,requiring him to show cause, within a period of seven working days from the date of the service of such notice, as to why his registration shall not be cancelled.*

(2) The reply to the show cause notice issued under sub-rule (1) shall be furnished in FORM REG–18 within the period specified in the said sub-rule.

(3)Where a person who has submitted an application for cancellation of his registration is no longer liable to be registered or his registration is liable to be cancelled, the proper officer shall issue an order in FORM GST REG-19, within a period of thirty days from the date of application submitted under [sub-rule (1) of] 16 rule 20 or, as the case may be, the date of the reply to the show cause issued under sub-rule (1), cancel the registration, with effect from a date to be determined by him and notify the taxable person, directing him to pay arrears of any tax, interest or penalty including the amount liable to be paid under sub-section (5) of section 29.

(4) Where the reply furnished under sub-rule (2) is found to be satisfactory, the proper officer shall drop the proceedings and pass an order in FORM GST REG – 20:

Provided that where the person instead of replying to the notice served under subrule (1) for contravention of the provisions contained in clause (b) or clause (c) of sub-section (2) of section 29, furnishes all the pending returns and makes full payment of the tax dues along with applicable interest and late fee, the proper officer shall drop the proceedings and pass an order in FORM GST-REG 20

(5) The provisions of sub-rule (3) shall, mutatis mutandis, apply to the legal heirs of a deceased proprietor, as if the application had been submitted by the proprietor himself."

Further, Sec. 39 of the CGST Act stipulates as follows:

"Sec.39: Furnishing of returns.-- (1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a

person paying tax under the provisions of Section 10 or Section 51 or Section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars as may be prescribed.

(2) A registered person paying tax under the provisions of Section 10 shall, for each quarter or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of turnover in the State or Union territory, inward supplies of goods or services or both, tax payable and tax paid within eighteen days after the end of such quarter.

(3) Every registered person required to deduct tax at source under the provisions of Section 51 shall furnish, in such form and manner as may be prescribed, a return, electronically, for the month in which such deductions have been made within ten days after the end of such month.

(4) Every taxable person registered as an Input Service Distributor shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within thirteen days after the end of such month.

(5) Every registered non-resident taxable person shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, within twenty days after the end of a calendar month or within seven days after the last day of the period of registration specified under sub-section (1) of Section 27, whichever is earlier.

(6) The Commissioner may, for reasons to be recorded in writing, by notification, extend the time limit for furnishing the returns under this section for such class of registered persons as may be specified therein:

Provided that any extension of time limit notified by the Commissioner of State tax or Union territory tax shall be deemed to be notified by the Commissioner.

(7) Every registered person, who is required to furnish a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return.

(8) Every registered person who is required to furnish a return under sub-section (1) or sub-section (2) shall furnish a return for every tax period whether or not any supplies of goods or services or both have been made during such tax period.

(9) Subject to the provisions of Sections 37 and 38, if any registered person after furnishing a return under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (4) or sub-section (5) discovers any omission or incorrect particulars therein, other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities, he shall rectify

such omission or incorrect particulars in the return to be furnished for the month or quarter during which such omission or incorrect particulars are noticed, subject to payment of interest under this Act:

Provided that no such rectification of any omission or incorrect particulars shall be allowed after the due date for furnishing of return for the month of September or second quarter following the end of the financial year, or the actual date of furnishing of relevant annual return, whichever is earlier.

(10) A registered person shall not be allowed to furnish a return for a tax period if the return for any of the previous tax periods has not been furnished by him."

Rule 61 of the CGST Rules, provides as follows:

"Rule 61: Form and manner of submission of monthly return.- *(1) Every registered person other than a person referred to in Section 14 of the Integrated Goods and Services Tax Act, 2017 (Central Act 13 of 2017) or an Input Service Distributor or a non-resident taxable person or a person paying tax under Section 10 or Section 51 or, as the case may be, under Section 52 shall furnish a return specified under sub-section (1) of Section 39 in FORM GSTR-3 electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner.*

(2) Part A of the return under sub-rule (1) shall be electronically generated on the basis of information furnished through FORM GSTR-1, FORM GSTR-2 and based on other liabilities of preceding tax periods.

(3) Every registered person furnishing the return under sub-rule (1) shall, subject to the provisions of Section 49, discharge his liability towards tax, interest, penalty, fees or any other amount payable under the Act or the provisions of this Chapter by debiting the electronic cash ledger or electronic credit ledger and include the details in Part B of the return in FORM GSTR-3.

(4) A registered person, claiming refund of any balance in the electronic cash ledger in accordance with the provisions of sub-section (6) of Section 49, may claim such refund in Part B of the return in FORM GSTR-3 and such return shall be deemed to be an application filed under Section 54.

(5) Where the time limit for furnishing of details in FORM GSTR-1 under Section 37 and in FORM GSTR-2 under Section 38 has been extended and the circumstances so warrant, return in FORM GSTR-3B, in lieu of FORM GSTR-3, may be furnished in such manner and subject to such conditions as may be notified by the Commissioner.

(6) Where a return in FORM GSTR-3B has been furnished, after the due date for furnishing of details in FORM GSTR-2—

(a) Part A of the return in FORM GSTR-3 shall be electronically generated on the basis of information furnished through FORM GSTR-1,

FORM GSTR-2 and based on other liabilities of preceding tax periods and PART B of the said return shall be electronically generated on the basis of the return in FORM GSTR-3B furnished in respect of the tax period;

(b) the registered person shall modify Part B of the return in FORM GSTR-3 based on the discrepancies, if any, between the return in FORM GSTR-3B and the return in FORM GSTR-3 and discharge his tax and other liabilities, if any;

(c) where the amount of input tax credit in FORM GSTR-3 exceeds the amount of input tax credit in terms of FORM GSTR-3B, the additional amount shall be credited to the electronic credit ledger of the registered person."

Further, it has to be noted that Sec. 29(2) of the CGST stipulates as follows:

"Sec. 29: Cancellation of registration.--
(1)...

(2) The proper officer may cancel the registration of a person from such date, including any retrospective date, as he may deem fit, where,--

(a) a registered person has contravened such provisions of the Act or the rules made thereunder as may be prescribed; or

(b) a person paying tax under Section 10 has not furnished returns for three consecutive tax periods; or

(c) any registered person, other than a person specified in Clause (b), has not furnished returns for a continuous period of six months; or

(d) any person who has taken voluntary registration under sub-section (3) of Section 25 has not commenced business within six months from the date of registration; or

(e) registration has been obtained by means of fraud, wilful misstatement or suppression of facts:

Provided that the proper officer shall not cancel the registration without giving the person an opportunity of being heard.

5. A combined reading of these provisions would clearly indicate that an assessee like the petitioner is bound to file return for the month concerned on or before the 20th of the succeeding month concerned. Further a reading of Sec. 29(2)(c) of the CGST Act would

also disclose that it is mandated by the Legislature that if there is continuous six months' default on the part of the assessee in filing returns, then the competent authority can invoke the power under Sec. 29(2)(c) of the said Act to cancel the registration. In the instant case, Ext.P-5 is the tabular statement given by the petitioner as directed by this Court showing all the details of the tax paid and dates on which the respective monthly returns filed for the months from July, 2017 to July, 2019.

6. The respondents were directed by this Court to ascertain the factual correctness of the details in Ext.P-5 and more particularly as to whether the petitioner had indeed filed the return for the month of May, 2019 on 10.12.2019 as shown in Ext.P-2 series of documents.

7. The respondents do not have any serious dispute about the correctness of the details in Ext.P-5 tabular statement, more particularly regarding the returns filed for the relevant months. Both sides do not have any dispute that as on the date of issuance of Ext.P-1 show cause notice on 13.11.2019, there was indeed six months' continuous default on the part of the petitioner in filing the returns. Therefore the the basic jurisdictional fact for issuing a show cause notice in the nature of Ext.P-1 has been correctly and properly done by the 4th respondent. It appears that the petitioner has filed

the return for the month of May, 2019, on 10.12.2019 at 11.30 a.m. as can be seen from Ext.P-2 series of documents, when the 4th respondent has passed Ext.P-3 cancellation order on the same date (10.12.2019). True as the filing of the return is through on-line process, the 4th respondent cannot be blamed for not knowing as on 10.12.2019 (date of issuance of Ext.P-3 order) that the petitioner has filed returns for the month of May, 2019 on the same day (10.12.2019). Moreover, the petitioner has also not informed the 4th respondent either on 10.12.2019 or immediately thereafter about the crucial fact that the petitioner has indeed filed the returns for the month of May, 2019 on 10.12.2019. But the fact of the matter is that since the petitioner had indeed filed returns for the month of May, 2019 on 10.12.2019 as per Ext.P-2, it goes beyond any doubt that as on the date of issuance of Ext.P-3 order dated 10.12.2019, the petitioner had only 5 months' continuous default and not the mandatory 6 months' continuous default, which is the essential jurisdictional fact required for invoking the power of cancellation of the registration under Sec. 29(2)(c) of the CGST Act. A perusal of the factual aspects in this case will disclose that the last return filed by the petitioner as per Ext.P-5 tabular statement is for the month of July, 2019 and the said return for that month was filed on 2.1.2020. For the

months of June, 2019 and May, 2019, the petitioner has filed returns on 18.12.2019 and 10.12.2019 respectively. As on 10.12.2019, (date of issuance of Ext.P-3 order) the petitioner has not filed returns for the months October, 2019, September 2019, August, 2019, July 2019 and June 2019. In this connection it is to be noted that the petitioner had subsequently filed return for the month of July, 2019 and June, 2019 on 2.1.2020 and 18.12.2019 respectively, which is after the date of issuance of Ext.P-3 datd 10.12.2019. Therefore, the petitioner has filed returns for the month of May, 2019 on 10.12.2019, he has continuous default of 5 months, ie. for the months from October, 2019 to June 2019 (5 months). For the month of November, 2019, the outer time limit for the petitioner for filing return is upto 20.12.2019 and for the month of December, 2019, the outer time in that regard is upto 20th January, 2020. Therefore, there does not appear to be any dispute on this crucial factual aspect. Therefore as on the date of the issuance of Ext.P-3 order dated 10.12.2019, the petitioner's continuous default in not filing return is only 5 continuous months and not 6 continuous months.

8. Sri.Sreelal N.Warrier, the learned Standing Counsel for the Central Board of Indirect Taxes, Government of India, appearing for respondents 2 and 4 was requested to get factual instructions on

this aspect. Today, when the matter has been taken up for consideration, it is pointed out that the petitioner has filed returns for the month of May, 2019 on 10.12.2019 as per Ext.P-2 series and further that the petitioner has never informed the 4th respondent on 10.12.2019 about the factum of filing of the return for the month of May, 2019 on 10.12.2019.

9. This Court would certainly say that the 4th respondent cannot be faulted for having passed an order in the nature of Ext.P-3 on 10.12.2019, because he was totally unaware that the petitioner would indeed file return for the month of May, 2019 on 10.12.2019, etc.

10. Rule 22 of the CGST Act reads as follows:

> ***"Sec.22: Persons liable for registration.--***
>
> *(1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes a taxable supply of goods or services or both, if his aggregate turnover in a financial year exceeds twenty lakh rupees:*
> *Provided that where such person makes taxable supplies of goods or services or both from any of the special category States, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.*
>
> *(2) Every person who, on the day immediately preceding the appointed day, is registered or holds a licence under an existing law, shall be liable to be registered under this Act with effect from the appointed day.*
>
> *(3) Where a business carried on by a taxable person registered under this Act is transferred, whether on account of succession or otherwise, to another person as a going concern, the transferee or the successor, as the case may be, shall be liable to be registered with effect from the date of such transfer or succession.*
>
> *(4) Notwithstanding anything contained in sub-sections (1) and (3), in a case of transfer pursuant to sanction of a scheme or an arrangement for*

amalgamation or, as the case may be, demerger of two or more companies pursuant to an order of a High Court, Tribunal or otherwise, the transferee shall be liable to be registered, with effect from the date on which the Registrar of Companies issues a certificate of incorporation giving effect to such order of the High Court or Tribunal.
Explanation.-- For the purposes of this section,--
(i) the expression "aggregate turnover" shall include all supplies made by the taxable person, whether on his own account or made on behalf of all his principals;
(ii) the supply of goods, after completion of job work, by a registered job worker shall be treated as the supply of goods by the principal referred to in Section 143, and the value of such goods shall not be included in the aggregate turnover of the registered job worker;
(iii) the expression "special category States" shall mean the States as specified in sub-clause (g) of Clause (4) of Article 279A of the Constitution."

11. Sec. 29(2)(c) mandates that power for the cancellation of registration in a case where there is continuous six months' default on the part of the assessee in filing the returns. Since the competent official is obliged to issue a notice in the nature of Ext.P-1 before he passes final orders, it goes without saying that the requirement of 6 months' continuous period should be fulfilled both at the time of issuance of the abovesaid notice in terms of the proviso to Sec. 29(2) of the CGST Act read with Rule 22 of the CGST Act, but also at the stage of passing the final order cancelling the registration as per Sec. 29(2)(c). In the instant case, the jurisdictional fact regarding the six months' continuous default on the part of the assessee is certainly fulfilled at the time of issuance of Ext.P-1 show cause notice dated 13.11.2019. Whereas, the said vital requirement of jurisdictional fact is non-existent as on the date of issuance of the impugned Ext.P-3 cancellation order dated 10.12.2019. If that be so, it is only to be held

that the impugned order as per Ext.P-3 is illegal and ultra vires and is liable to be interdicted by this Court. Accordingly, it is ordered that the impugned Ext.P-3 order will stand quashed.

12. It is made clear that this Court has only decided the limited aspect regarding the jurisdictional fact required for invoking the power under Sec. 29(2)(c) of the CGST Act and in case the petitioner is liable for any of the manner for the abovesaid Act, or in case the petitioner after the issuance of Ext.P-3 has subsequently defaulted six months' continuous period in filing returns, etc. then the competent officer concerned is certainly at liberty to proceed in accordance with law, but certainly after compliance of the basic requirements of fairness and natural justice.

With these observations and directions, the Writ Petition (Civil) stands finally disposed of.

Sd/-

sdk+ **ALEXANDER THOMAS, JUDGE**

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	**COPY OF NOTICE ISSUED BY THE 1ST RESPONDENT DATED 13.11.2019.**
EXHIBIT P2	**COPY OF RETURN FILED BY THE PETITIONER FOR MAY 2019 DATED NIL.**
EXHIBIT P2 A	**COPY OF RETURN FILED BY THE PETITIONER FOR JUNE 2019 DATED NIL.**
EXHIBIT P3	**COPY OF ORDER ISSUED BY THE FIRST RESPONDENT DATED 10.12.2019.**
EXHIBIT P4	**COPY OF RETURN FILED BY THE PETITIONER FOR THE MONTH OF JULY 2019.**