



W.P.(MD).Nos.7173 and 7174 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.09.2023

PRONOUNCED ON :24.11.2023

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).Nos.7173 and 7174 of 2023

and

W.M.P.(MD)Nos.6764 and 6765 of 2023

Tvl.Kavin HP Gas Gramin Vitrak,
represented by Proprietor Palaniyandi Arun,
No.112, 113, N.A., Cheran Complex,
Bank Road, Uranganpatty,
Madurai – 625 109.

... Petitioner in both cases

Vs.

1.The Commissioner of Commercial Taxes,
Office of the Principal and Special
Commissioner of Commercial Taxes,
Ezhilagam, Chepauk,
Chennai-600 005.

2.The Deputy State Tax Officer-1,
Office of State Tax Officer,
Melur Assessment Circle,
CT Building, Dr.Thangaraj Salai,
Madurai-20.

... Respondents in both cases

Prayer in W.P.(MD)No.7173 of 2023: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for records pertaining to the impugned proceedings of the 2nd respondent in



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GSTIN.33BAGPA0449A1ZM/2017-18, dated 16.08.2022 and to quash the same as illegal and devoid of merits.

Prayer in W.P.(MD)No.7174 of 2023: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for records pertaining to the impugned proceedings of the 2nd respondent in GSTIN.33BAGPA0449A1ZM/2018-19, dated 16.08.2022 and to quash the same as illegal and devoid of merits.

In both cases:

For Petitioner : Mr.Raja Karthikeyan
For Respondents : Mr.A.K.Manikkam
Special Government Pleader

COMMON ORDER

These writ petitions are filed for writ of Certiorari to quash the impugned orders, dated 16.08.2022. The writ petition in W.P.(MD)No.7173 of 2023 is filed for the financial year 2017-2018 and W.P.(MD)No.7174 of 2023 is filed for the financial year 2018-2019.

2. The petitioner is doing business related to Petroleum Gases and other Gaseous Hydrocarbons in Urangampatty and registered with the respondent department in GSTIN.33BAGPA0449A1ZM and was promptly filing monthly returns. Based on the scrutiny and verification of GSTR-3B returns filed in the



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financial year 2017-2018 and 2018-2019, the 2nd respondent issued notice dated 27.04.2022 and directed the petitioner to show cause why there was a belated claim of Input Tax Credit (ITC) and also directed to remit back the same as wrong claim of ITC and proposed to reverse the same. Further it is alleged that the petitioner had claimed on the purchase of Petroleum product. The petitioner submitted that due to financial crisis the petitioner had submitted GSTR-3B physically and the same was already explained to the respondents in person through his Accountant and hence the allegation by the respondents that the said claim is false cannot be accepted.

3. The contention of the petitioner is that he had also explained the fact that the claim of ITC is described under Rule 60 of the TNGST Rules and the Form prescribed is Form GSTR-2, but the same was not notified. Moreover, the filing of GSTR-3B is to avail the input tax credit and not for claiming the same. So the reversal of input tax for belated claim as per Section 16(4) of TNGST Act is not applicable, since the filing of GSTR3B is not meant for claim of input tax credit. The further contention of the petitioner is that the sales made to the petitioner and the tax collected from the petitioner were duly reported by other end supplier through their respective GSTR-1 and the



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petitioner could not claim the same since Form GSTR-2 is not notified. Hence, the petitioner has accounted the purchases and credited the tax payment made through tax invoice, claimed ITC in the books of accounts and availed the same through GSTR-3B filed physically. Hence, the allegation of belated claim of ITC itself is false and misleading.

4. However, to the shock of the petitioner, the 2nd respondent has passed the impugned order and confirmed the proposal with regard to the alleged belated claim of input tax credit. The 2nd respondent has not at all dealt with the specific contention that the claim of the ITC can be made only through GSTR-2 and the said Form was not notified and the filing of GSTR-3B is not meant for claiming of ITC. The petitioner's specific contention of the petitioner is that the petitioner had claimed ITC without violation of procedures contemplated under the Act and rules. When the petitioner is entitled to ITC as per the provisions, disallowing the same by observing that the returns are not filed in prescribed time and the same is totally irrelevant. Moreover, the respondents had passed a non-speaking order, without meeting out the specific contentions of the petitioner. Moreover, GSTR-3B is not at all returned as prescribed in Section 39 of the TNGST Act. As per Notification No.49 of 2019



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(Central Tax), dated 09.10.2019, the Government declared that the reconciliation statement GSTR-3B may be treated as GSTR-3 in retrospective manner and the same is not correct and the same is against the Constitution. Hence, the petitioner has approached this Court to quash the impugned order.

5. The 2nd respondent had filed counter affidavit in both the writ petitions stating that the writ petitions are not maintainable since the petitioner has an alternative remedy to prefer an appeal before the jurisdictional Appellate Deputy Commissioner (GST Appeals). Prima facie the revision of assessment was made out based on the scrutiny of GSTR-3B returns and hence notices in Form- GST-DRC-01A (Rule 142(i)) were issued to explain the issue with the documentary evidences why there was a belated claim of ITC. The statute is very clear that the burden of proof is lying with the taxable person and he has to prove that there is no evasion of tax. Based on the belated filing of returns GSTR-3B, a notice, dated 03.03.2022, was issued proposing to levy tax under Section 73(5) of the Act, 2017. The petitioner has not filed any objections with the supportive documents till the show cause notice in Form-GST-DRC-01 (Rule 142(I)), dated 27.04.2022, was issued. In the absence of objections, the said show cause notice in Form-GST-DRC-01 Rule 142(1) dated 27.04.2022



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was issued proposing to levy tax and penalty, calling for objections to the proposal, but the petitioner had not submitted any objections. Thereafter, personal hearing was granted on 07.07.2022 in order to grant natural justice. But the petitioner has not attended the personal hearing with supportive documents till the passing of order in Form-GST DRC-07 (Rule 142 (5)). When the petitioner has not filed any objections, it would be evident that the petitioner is not having any record or documents to prove his case. As per the provisions of Act and Rules especially Rule 61(5) 2017, every taxable person has to file monthly return for every month on or before 20th of the subsiding month. The taxable person is mandated to file monthly returns only electronically and not by manually. Since the petitioner had not filed any objections and had not attending the personal hearing, the respondents left with no other option than to confirm the proposal already made in the notice. Accordingly, order, dated 16.08.2022, was passed. Therefore, the 2nd respondent prayed to dismiss the writ petitions.

6. Heard Mr.Raja Karthikeyan, learned Counsel appearing for the petitioner in both the writ petitions and Mr.A.K.Manikkam, learned Special Government Pleader appearing for the respondents in both the writ petitions



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and perused the records.

7. The contention of the petitioner is that as per Section 38 of the GST Act read with Rule 60 of the TNGST Rules, the ITC shall be claimed through GSTR-2, GSTN had not provided the facility of GSTR-2 till now. The Learned Counsel appearing the petitioner specifically submitted that it is due to technical reasons and the mistake ought to be rectified by the GST Council, unfortunately the GST Council had not taken up the issue to rectify the same. Since the GSTR-2 was not notified, which is meant for claiming ITC, hence the petitioner could not claim the ITC within the prescribed time. In the counter affidavit, the respondents have not denied the allegation. Further the 2nd respondent has only stated that any Form can be filed only electronically, that too it has to be filed on or before 20th of every month. When the said GSTR-2 Form is not available, then electronic filing is not possible, then taxable person cannot be expected to file the Form electronically. Therefore, the basis of initiation of the proceedings itself is not sustainable.

8. The petitioner further submits the claim of ITC defined under Rule 60, which reads as under:



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“Rule 60:- Form and manner of furnishing details of inward supplies:

1....

2....

3. The registered person shall specify the inward supplies in respect of which he is not eligible, either fully or partially for input tax credit in Form GSTR-2 where such eligibility can be determined at the invoice level”

When the Rules specifically prescribes GSTR-2 to specify the inward supplies for claiming ITC, when the said form is not notified, the petitioner cannot be expected to file the same to claim ITC.

9. The respondents without giving any opportunity to file the returns by notifying the Form GSTR-2, cannot expect the taxable person to file returns. In fact, the petitioner has no intension to violate the provisions of the Act. In order to show his bonafide, he has filed physically. Moreover, all tax liability is paid and there is no loss to the department. Moreover, the petitioner has also claimed financial crisis. Even though the financial crisis cannot be a ground for not filing the returns in time, not notifying of Form GSTR-2 is clearly a ground to consider the petitioner's claim of belated returns.

10. The learned Counsel appearing for the petitioner relied on the judgment rendered by the High Court of Punjab and Haryana in the case of



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Hans Raj Sons Vs. Union of India and others in CWP No.36396 of 2019, dated 16.12.2019, wherein the Hon'ble Court has allowed the tax payer to file the return either electronically or manually, if the portal is not opening. In the said judgment, the High Court of Punjab and Haryana has relied on another judgment rendered in CWP No.30949 of 2018, in the case of ***Adfert Technologies Private Limited Vs. Union of India and others***, dated 04.11.2019. The same issue was also considered by the Madras High Court in W.P.No.29676 of 2019, dated 06.10.2020, wherein it is stated as under:

“19. Admittedly, the 31st of March 2019 was the last date by which rectification of Form – GSTR 1 may be sought. However, and also admittedly, the Forms, by filing of which the petitioner might have noticed the error and W.P. No.29676 of 2019 sought amendment, viz. GSTR-2A and GSTR-1A are yet to be notified. Had the requisite Forms been notified, the mismatch between the details of credit in the petitioner's and the supplier's returns might well have been noticed and appropriate and timely action taken. The error was noticed only later when the petitioners' customers brought the same to the attention of the petitioner.

20. In the absence of an enabling mechanism, I am of the view that assessee should not be prejudiced from availing credit that they are otherwise legitimately entitled to. The error committed by the petitioner is an inadvertent human error and the petitioner should be in a position to rectify the same, particularly in the absence of an effective, enabling mechanism under statute.



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21. This writ petition is allowed and the impugned order set aside. The petitioner is permitted to re-submit the annexures to Form GSTR-3B with the correct distribution of credit between IGST, SGST and CGST within a period of four weeks from date of uploading of this order and the respondents shall take the same on file and enable the auto-population of the correct details in the GST portal. No costs.”

In the above said order, this Court has clearly held that in the absence of any enabling mechanism, the assessee cannot be prejudiced by not granting ITC. Therefore, following the aforesaid judgments this Court is inclined to set aside the impugned order.

11. The next contention of the petitioner is that the ITC can be claimed through GSTR-3B, but GSTN has not permitted to file GSTR-3B in online if the dealers had not paid taxes on the outward supply / sales. In other words, if the dealer is not enabled to pay output tax, he is not permitted to file GSTR-3B return in online and it is indirectly obstructing the dealer to claim ITC. In the present case the petitioner was unable to pay output taxes and so the GSTN not permitted to file GSTR-3B in the departmental web portal it is constructed that the petitioner had not filed GSTR-3B online, that resulted the dealer unable to claim his ITC in that particular year in which he paid taxes in his purchases.



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Hence if the GSTN provided option for filing GSTN without payment of tax or incomplete GSTR-3B, the dealer would be eligible for claiming of input tax credit. The same was not provided in GSTN network hence, the dealers are restricted to claim ITC on the ground of non-filing of GSTR-3B within prescribed time. if the option of filing incomplete filing of GSTR-3B are provided in the GSTN network the dealers would avail the claim and determine self-assessed ITC in online. The petitioner had expressed real practical difficulty. The GST Council may be the appropriate authority but the respondents ought to take steps to rectify the same. Until then the respondents ought to allow the dealers to file returns manually.

12. Therefore, following the above said judgments, this Court is inclined to quash the impugned orders and accordingly the impugned orders are quashed. The respondents shall permit the petitioner to file manual returns whenever the petitioner is claiming ITC on the outward supply / sales without paying taxes. Further the respondents are directed accept the belated returns and if the returns are otherwise in order and accordance to law, the claim of ITC may be allowed. Hence, the matter is remitted back to the authorities for reconsideration.



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13. With the above said observation, the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

24.11.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No
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To

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- 1.The Commissioner of Commercial Taxes,
Office of the Principal and Special
Commissioner of Commercial Taxes,
Ezhilagam, Chepauk,
Chennai-600 005.

- 2.The Deputy State Tax Officer-1,
Office of State Tax Officer,
Melur Assessment Circle,
CT Building, Dr.Thangaraj Salai,
Madurai-20.



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S.SRIMATHY, J.

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