BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.09.2023

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).No.18707 of 2023
and
W.M.P.(MD)No.15532 of 2023

M/s.Vishnu Trading,
represented by a Partner A.V.B.Prabhu,
No.120, Desiga Vinayagar Kovil Street,
K.Pudur, Madurai. ... Petitioner

Vs.

1.The Additional Commissioner of CGST
and Central Excise,
No.4, Lal Bagadur Sashtiri Road,
B.B.Kulam, Madurai.

2.The Additional Commissioner, (Audit),
Office of the Commissioner of GST and
Central Excise (Audit),
No.6/7, A.T.D. Street,
Race Course Road, Coimbatore. ... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a ***Writ of Certiorari,*** to call for the entire records pertaining to the show cause notice in SCN No.19/2022-ADC, dated

10.11.2022, issued by the 2nd respondent as well as the consequential order passed by the 1st respondent in DIN 2023159XO0000022272F in FILE NUMBER GEXCOM/ADJN/GST/ADC/674/2022-ADJN, dated 31.01.2023 and to quash the same.

For Petitioner	:	Mr.R.Anand
For Respondents	:	Mr.R.Nandakumar Senior Standing Counsel assisted by M/s.S.Ragaventhre Junior Standing Counsel

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ORDER

This writ petition is filed for writ of ***Certiorari,*** to quash the show cause notice, dated 10.11.2022, issued by the 2nd respondent as well as the consequential order passed by the 1st respondent, dated 31.01.2023.

2. The petitioner is engaged in trading of steaming (non-coking) coal falling under the division of HSN 27011920 and is having registration number in GSTIN No.33AALFV4390F1Z0. The contention of the petitioner is that during the course of business on 20.01.2022 the petitioner had submitted documents for auditing, which had been conducted from 22.03.2022 to 24.03.2022. On completion of auditing, it was informed five discrepancies were

found. As far as the discrepancies in para 3 to 5 in the report is concerned, the petitioner accepted the said discrepancies and paid the said amount and as a result no further action have been proceeded in respect of the said paragraphs 3 to 5. Since the amount stated in paragraphs 1 and 2 was not paid the 2nd respondent through his proceedings dated 30.03.2022 issued show cause notice and thereby directed to remit the payment of Rs.8,68,184/- and Rs. 1,17,31,328/- The petitioner was granted personal hearing on 08.12.2012, but the petitioner could not attend the personal hearing due to illness and hence the petitioner sought for adjournment. The petitioner was under the impression that he would be granted another opportunity. But the respondent had passed the impugned order dated 10.11.2022, whereby the case of the petitioner was rejected and the petitioner was directed to pay Rs.8,68,184/- with equal penalty of Rs.8,68,184/- and Rs.1,17,31,328/- with equal penalty of Rs.1,17,31,328/-.

3. The petitioner had not attended the personal hearing and had sought for adjournment. But the respondent without granting further opportunity had passed the impugned order and the same amount to violative of

principles of natural justice. If there is violation of principles of natural justice then the petitioner is entitled to seek remedy under Article 226. Therefore, the respondent's plea of alternative remedy fails and the writ petition is maintainable.

4. The show cause notice states that during the course of audit of accounts of the tax payer for the period from 2017-2018 (July 2018 to March 2018), 2018-2019 and 2019-2020 it reveals that,

a. The tax payer had not paid GST Compensation Cess on the outward supply of Coal during the period from 02.08.2017 to 05.09.2017 to the tune of Rs.8,68,184/- which is recoverable under Section 73(1) of CGST Act, 2017 read with Sections 8 and 11 of GST (Compensation to States) Act, 2017 and liable to pay interest at a rate of 18% under section 50(1) of the CGST Act, 2017.
b. The had collected Compensation Cess to the tune of Rs. 1,17,31,328/- but had not paid the same to the Government account during the period 2017-2018 (from 11.09.2017 to 31.03.2018), 2018-2019 and 2019-2020 and the same is

recoverable under Section 76 of the CGST Act, 2017 read with Sections 8 and 11 of GST (Compensation to States) Act, 2017 and liable to interest at a rate of 18% under Section 50(1) of the CGST Act, 2017.

5. The contention of the petitioner is that the GST Act came into effect on 01.07.2017 and the transaction is alleged from 02.08.2017 to 05.09.2017, which is one month after the Act came into force. According to the petitioner, since the transactions has to be uploaded in the computer, they found it difficult to upload the same and it is in the transitory stage from the earlier Tax Act to the GST Act. The petitioner also submitted that as far as Rs. 8,68,184/- is concerned, they ought to have collected the tax portion from the recipient namely Shri. TVS Chakra, but the petitioner had not collected tax from the recipient but they have paid the tax, hence the petitioner is seeking relief from penalty and interest under the Act. Even the respondents accepted the contention of the petitioner that the tax has not been recovered from the recipient. Moreover, levy of penalty is not automatic. Therefore, this Court is of the considered opinion that when it is not recovered but when the petitioner has

already paid the tax component, the plea of the petitioner ought to be considered at least for refraining from levying penalty.

6. As far as the Compensation Cess collected but not paid to the Government account during the period 2017-2018 (From 11.09.2017 to 31.03.2018), 2018-2019 and 2019-2020 to the tune of Rs.1,17,31,328/- is concerned, the 1st respondent had accepted in his counter affidavit that the petitioner is entitled to ITC. However, the contention of the respondent is that, for claiming ITC the petitioner ought to have declared the same in his monthly returns. Since the petitioner had declared as "zero" in his monthly returns, then the petitioner is not entitled to the same. The relevant portion of the counter affidavit is extracted hereunder:

> *"As had been stated by the petitioner in their reply to the Show Cause Notice, they were eligible to offset ITC, i.e., payment of cess at the time of subsequent sale of coal. The petitioner ought to have thus availed ITC on the impugned cess paid by way of declaring the same in their monthly GSTR-3B returns filed. However, they have failed to do so, thereby contravening legal provisions. Admittedly, they have reconciled and filed GSTR-3B returns only after the conduct of audit. Mere*

adjustment in their own books of accounts without bringing the complete facts related to the tax/ cess involved to the knowledge of the department amounts to contravention of legal provisions with an intention to suppress the facts."

7. The respondents had stated that the petitioner had not declared at the time of filing the monthly returns. But has also stated that the petitioner had reconciled and had filed GSTR-3B returns, after audit. When the petitioner had rectified, reconciled, then the petitioner is entitled to ITC. When the Act provides for rectification, provides for filing subsequent returns, then the respondents are bound to consider for granting the benefits. If the same is declined then the same would amount to declining the benefits, which the tax payer is entitled. It also amounts to not only declining, but the respondent would further impose interest and penalty for the very same sum. From declining the benefits to impose penalty is harsh and hence the same ought to be reconsidered.

8. For the reasons stated supra, the petitioner is entitled to be

considered and the impugned order is liable to be quashed and accordingly quashed. Since this Court had only quashed the impugned order and not the impugned show cause notice, the matter is remitted back to the authorities for reworking based on the reconciled and revised GST 3B and consider and pass orders. The said exercise shall be considered within a period of eight weeks from the date of receipt of a copy of this order.

9. With the above said observation, the writ petition is allowed in above terms. No costs. Consequently, connected miscellaneous petition is closed.

11.09.2023

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

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To

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and Central Excise,
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S.SRIMATHY, J.

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