BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.04.2024

CORAM

**THE HON'BLE MR.JUSTICE C.SARAVANAN**

**W.P.(MD) No.19544 of 2021**
and
**W.M.P.(MD)No.16232 of 2021**

M/s.Shri Narayan Corporation,
Rep. by its Managing Partner S.Arunraj,
No.2/1, Kadalaikarar Street,
Virudhunagar – 626001. ... Petitioner

Vs.

1.Union of India,
Rep. by its Secretary to Government,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.

2.The Superintendent (Audit),
Office of the Assistant Commissioner of Central GST and Excise,
Madurai Audit Circle,
B.B.Kulam, Madurai-625002.

3.The Superintendent,
Office of the Superintendent of C.G.S.T and Central Excise, Virudhunagar-II Range,
Central Excise Staff Quarters Campus,
Madurai Road,
Virudhunagar-626001. ... Respondents

Prayer: Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari calling for the records on the files of the 3rd respondent in Order-in-Original No.02/XO0502/2021 dated 13.09.2021 and quash the same as illegal, unsustainable and contrary to the provisions of Integrated Goods and Services Tax Act, 2017, Central Goods and Services Tax Act, 2017 and Tamil Nadu Goods and Services Tax Act, 2017.

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|---|---|
| For Petitioner | : Mr.A.Chandrasekaran |
| For R1 | : No Appearance |
| For R2 & R3 | : Mr.N.Dilip Kumar<br>Senior Standing Counsel |

**ORDER**

The petitioner has challenged the impugned Order-in-Original No. 02/XO0502/2021 dated 13.09.2021 passed by the third respondent. By the impugned order, the third respondent has concluded as follows:-

*12. From the above discussion, it can be concluded beyond doubt that:*

*a) The taxpayer is liable to pay GST on ocean freight incurred by them during Jul-17 to Mar-18, under RCM, amounting Rs.1,50,402/-, with appropriate interest.*

*b) ITC availed by the taxpayer during Jul-17 to Mar-18, in respect of five inward supplies, in respect of which they were not in possession of the tax invoices, amounting Rs.4,12,438/- is not eligible and is liable to be recovered with appropriate interest*

*c) ITC availed by the taxpayer during Jul-17 to Mar-18, in respect of three inward supplies, the details of which are not reflected in corresponding GSTR-2A, amounting Rs.13,018/- is not eligible and is liable to be recovered with appropriate interest.*

*d) Penalty is leviable under Section 122(2)(a) of the CGST Act, read with Section 73(9) ibid.*

2. The operative portion of the impugned order demanding the tax reads as under:-

*13. Accordingly, the following order is passed.*

***ORDER***

*a) Demand and recovery of* ***Rs.1,50,402/- (Rupees One Lakh, Fifty Thousand, Four Hundred and Two Only)****, payable towards IGST on Ocean Freight incurred during the period from Jul-17 to Mar-18 is confirmed under Section 73(1) of the CGST Act, read with Section 20 of the IGST Act;*

*b) Demand and recovery of interest on the amount of Rs.1,50,402/- in (a) above is confirmed under Section 50(1) of the CGST Act, read with Section 73(1) ibid and Section 20 of the IGST Act;*

c) *Demand and recovery of* ***Rs.4,25,456/- (Rupees Four Lakh, Twenty-Five Thousand, Four Hundred and Fifty-Six Only)*** *[CGST - Rs.2,12,728 and SGST-Rs.2,12,728], payable towards wrong availment and utilization of ITC is confirmed under Section 73(1) of the CGST Act and corresponding section of the TNGST Act:*

d) *Demand and recovery of interest on the amount of Rs.4,25,456/- in (c) above is confirmed under Section 50(3) of the CGST Act, read with Section 73(1) ibid and the corresponding sections of the TNGST Act; and*

e) *Penalty of* ***Rs.57,586/- (Rupees Fifty-Seven Thousand, Five Hundred and Eighty-Six Only)*** *is imposed under Section 73(9) of the CGST Act, read with Section 122(2)(a) ibid and Section 20 of the IGST Act and corresponding sections of the TNGST Act.*

3. It is informed by the learned counsel for the petitioner which is also confirmed by the learned Senior Standing Counsel for the second and third respondents that as far as the demand in paragraph 13(a) & (b) of the impugned order is concerned, the issue is squarely covered in favour of the petitioner in terms of the decision of the Hon'ble Supreme Court in **Union of India and another** Vs. **M/s Mohit Minerals Pvt. Ltd.**, 2022 (61) GSTL 257 (SC). Paragraph No.6 of the counter affidavit filed by the respondents also admits the position which reads as under:-

*6. In the meanwhile, the issue of ocean freight charges for the import on CIF basis i.e. a separate levy under notifications No.8/2017-Integrated Tax (Rate), dated 28.06.2017, and 10/2017-Integrated Tax (Rate), dated 28.06.2017 on services provided by a person located in a non-taxable territory to another person located in a non-taxable territory, but the indirect/ultimate beneficiary is the importer, who is located in the taxable territory, was decided by the Supreme Court in Civil Appeal No.1390 of 2022 in the case of Mohit Minerals Pvt Ltd, and held that the import of goods by a CIF contract constitutes an "inter-state" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service and the levy imposed on the service aspect of the transaction as per CIF basis is in violation of principle of 'composite supply enshrined under section 2(30) read with section 8 of the CGST Act. The first demand of Rs. 1,50,402/-, in this case, is squarely covered under the Hon'ble Supreme Court Judgment, as department had not contested against the Apex Court order, the contention of the petitioner raised under paragraph 5 to 13, except para-12 doesn't warrant any reply.*

4. In view of the above, as far as the demand of Rs.1,50,402/- towards IGST on Ocean Freight under Section 73(1) of the CGST Act, 2017 read with Section 20 of IGST Act, 2017 and the interest on the aforesaid amount of Rs.1,50,402/- under Section 50(1) of the CGST Act, 2017 read with Section 73(1) of the CGST Act, 2017 and Section 20 of the IGST Act, 2017 is concerned, the demand has to go.

5. As far as the balance demand for Rs.4,25,456/- together with interest and penalty that has been imposed on the petitioner is concerned, it is noticed that the petitioner was unable to produce clear copy of the invoices based on which the petitioner had availed input tax credit in its Form GSTR-3B. It is submitted by the learned counsel for the petitioner that the information is also reflected in Form GSTR-2A which is an auto-populated Return which enables an assessee to utilize the input tax credit availed in Form GSTR-3B. It is submitted that the issue may be remitted back and one more opportunity may be granted to the petitioner.

6. On the other hand, the learned Senior Standing Counsel for the second and third respondents would submit that this Writ Petition is liable to be dismissed as there is no merits in the submission made by the learned counsel for the petitioner. It is submitted that despite several opportunities being granted to the petitioner, the petitioner has not produced the clear copy of the original invoices. Since it is illegible copy, the copy of the credit availed by the petitioner has been rightly rejected.

7. The learned Senior Standing Counsel for the second and third respondents would further submit that the credit that was availed by the

petitioner in respect of 3 invoices was also not reflected in GSTR-2A and therefore, on this count also, the demand has been rightly confirmed against the petitioner.

8. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the second and third respondents.

9. Paragraph 11.7, 11.8 & 11.9 of the impugned order reads as under:-

> *11.7 From the above statute, it can be seen that the basic condition of eligibility to avail ITC is that the taxpayer should be in possession of a tax invoice or debit note issued by the supplier under the CGST Act or such other tax paying documents as may be prescribed. In this case, the taxpayer was not able to produce the impugned tax invoices to the audit officers for verification, during audit. Even along with their reply to the show cause notice, they enclosed only highly illegible copies of the invoices, with which their genuineness could not be ascertained. During the personal hearing also, they produced such illegible copies only. Though they asserted during personal hearing that they would produce the invoices in a day or two, they did not furnish any invoice. From the same, it is clear that the taxpayer was not in possession of the five invoices pointed out by the audit officers. The taxpayer's*

*argument in this regard in their written reply and during the personal hearing was not relevant and does not hold good.*

*11.8 The third issue in the show cause notice is that three invoices in respect of which the taxpayer had availed ITC, were not reflected in GSTR-2A. As per Sec. 16(2) (c) of the CGST Act, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both received by him, unless the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply. As per Rule 59(1) of the CGST Rules, read with Sec.37 of the CGST Act, every registered person is required to furnish the details of outward supplies of goods or services or both in Form GSTR-1 electronically through the common portal. And as per Rule 59(3) of the CGST Rules, the details of outward supplies furnished by the supplier shall be made available electronically to the concerned registered persons (recipients) in Part-A of GSTR-2A through the common portal, after due date of filing of Form GSTR-1. As such, the ITC availed by the taxpayer vide GSTR-3B returns should be reflected in the corresponding GSTR-2A.*

*11.9 But in this case, three invoices pointed out by audit were not reflected in GSTR-2A, during the time of audit. Even in their reply to the show cause notice, the taxpayer has not stated categorically that the invoices have populated in the GSTR-2A. During the personal bearing also, they were not able to prove that the concerned invoices had appeared in the GSTR-2A Hence, it is obvious that the concerned invoices have not been uploaded in their GSTR-1, by the respective* *suppliers, which means that GST has not been paid on the same. Therefore, as per Section 16(2) of the CGST Act, the taxpayer is not eligible for ITC in respect of the concerned three invoices.*

10. In my view, the submission of the learned counsel for the petitioner that credit was auto-populated in GSTR-2A also, is incorrect in view of the above reason. Considering the same, I am inclined to dismiss this Writ Petition insofar as the demand in paragraph 13(c), (d) & (e) of the impugned order is concerned. Insofar as the demand in paragraph 13(a) & (b) for a sum of Rs.1,50,402/- towards IGST and interest thereon under Section 50(1) of the CGST Act, 2017 read with Section 73(1) of the CGST Act, 2017 and Section 20 of the IGST Act, 2017 is concerned, the issue is squarely covered in favour of the petitioner in terms of decision of the Hon'ble Supreme Court in **M/s Mohit Minerals Pvt. Ltd.** case referred to *supra*.

11. Therefore, this Writ Petition is partly allowed and partly dismissed with liberty to the petitioner to file a statutory appeal under Section 107 of the CGST Act, 2017 insofar as the demand for a sum of Rs.4,25,456/- and interest thereon under Section 50(3) of the CGST Act,

2017 read with Section 73(1) of the CGST Act, 2017 and the corresponding Sections of the TNGST Act, 2017 and penalty of Rs. 57,586/- under Section 73(9) of the CGST Act, 2017 read with Section 122(2)(a) of the CGST Act, 2017 and Section 20 of the IGST Act, 2017 and corresponding Sections of the TNGST Act, 2017 is concerned, within a period of 30 days from the date of receipt of a copy of this order.

12. It is open for the petitioner to obtain Certificate from the suppliers confirming the supply of goods under the contingent invoices and also request the suppliers to furnish the Certificate from the jurisdictional Assessing Officer/Auditor as per the relevant Circular.

13. In the result, this Writ Petition stands partly allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

15.04.2024

Index: Yes / No
Neutral Citation: Yes / No
Speaking Order / Non-Speaking Order

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Copy To:

1.The Secretary to Government,
Union of India,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi.

2.The Superintendent (Audit),
Office of the Assistant Commissioner of Central GST and Excise,
Madurai Audit Circle,
B.B.Kulam, Madurai-625002.

3.The Superintendent,
Office of the Superintendent of C.G.S.T and Central Excise, Virudhunagar-II Range,
Central Excise Staff Quarters Campus,
Madurai Road, Virudhunagar-626001.

**C.SARAVANAN, J.**

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