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2025**

Ct. No.
551

Ab

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

WPA 12637 of 2025

**Bidyut Autotech Private Limited and another
Vs.
The Assistant Commissioner of State Tax,
Bureau of Investigation, South Bengal (HQ)
and others.**

**Mr. Ankit Kanodia,
Ms. Megha Agarwal,
Mr. Piyush Khaitan.**

... for the petitioner.

**Mr. Swapan Kumar Dutta,
Mr. Tanoy Chakraborty,
Ms. Sumita Shaw,
Mr. Saptak Sanyal.**

... for the State.

1. This writ petition is directed against an order dated February 6, 2025 passed by the appellate authority under Section 107 of the West Bengal Goods & Services Tax Act, 2017/Central Goods and Services Tax Act, 2017 (hereafter “the said Act of 2017”).
2. The relevant facts as may be gathered from the material on record are these :
 - a) The petitioners are dealers of motor vehicles.
During the financial year 2017-2018, the petitioners had purchased motor vehicles from their supplier and had paid GST along with CESS as indicated in the tax invoices.
 - b) CESS charged by the petitioners’ supplier on

the supplies made by it to the petitioners were duly reflected in Form GSTR2A in terms of Section 38 of the said Act of 2017.

- c) The petitioners also charged CESS to their purchasers but since the petitioners earnestly believed that no CESS was payable by the petitioners as the petitioners had sufficient accumulated CESS on the inward supplies, therefore the petitioners did not disclose the CESS collected by them from the recipients of the outward supplies made by them to the recipients, while filing return in Form GSTR3B.
- d) However, at the time of finalization of the books of account, the petitioners realized their mistake (upon it being pointed out by their Chartered Accountant) and disclosed the entire amount of CESS in the annual report filed in form GSTR-9 in terms of Section 44 of the said Act of 2017, thereby indicating that no CESS was actually payable by the petitioners and the earlier non-disclosure of CESS was revenue neutral.
- e) Subsequently, a notice to show-cause was issued to the petitioners alleging that the petitioners had not paid the CESS to the tune of Rs. 44,71,625/- (Rupees forty four lakh seventy one thousand six hundred and twenty

five only) calculated from various suppliers at the time of outward supply of motor vehicles. The said notice was issued invoking Section 74 of the said Act of 2017. The petitioner did not reply to the said show-cause notice and, accordingly, an order under Section 74 of the said Act of 2017 was passed thereby holding the petitioner liable in a sum of Rs. 41,31,946/- (Rupees forty one lakh thirty one thousand nine hundred and forty six only) on account of taxes together with interest and penalty aggregating to Rs. 1,28,26,999/- (Rupees one crore twenty eight lakh twenty six thousand nine hundred and ninety nine only).

- f) The petitioners carried the matter in appeal before the appellate authority under Section 107 of the said Act of 2017 contending that the petitioners have not made any suppression or willful misstatement and have not committed any fraud, as alleged in the notice to show-cause and as held in the adjudication order impugned before the appellate authority. It was also contended by the petitioners that the mistake that had been committed in form GSTR-3B was ultimately corrected by the petitioners by filing the annual return in form GSTR-9. It was further contended on behalf of

the petitioners that since the petitioners were also entitled to ITC in respect of CESS paid by them on the inward supplies made to the petitioners, the same would be offset with the demand made by the GST Authorities in respect of the CESS in respect of outward supplies.

- g) The appellate authority considered the petitioner's case and accepted the petitioner's contention that there was no willful misstatement or suppression of fact or fraud committed on the part of the petitioners and accordingly converted the proceeding under Section 74 of the said Act of 2017 to a proceeding under Section 73 of the said Act of 2017.
- h) The appellate authority, however, did not take into consideration the effect of GSTR-9 and confirmed the findings of the adjudicating authority as regards the petitioners' liability for taxes while substantially slashing the amount imposed as penalty by the adjudicating authority. The petitioners were, however, not allowed any leverage on account of the accumulated CESS on the inward supplies to the petitioners despite the petitioners' claim that they were entitled to and had not claimed ITC on the CESS paid by them to their supplier.

i) Hence, this writ petition, mounting challenge to the appellate order.

3. Mr. Kanodia, learned Advocate appearing on behalf of the petitioners, submits that while the appellate authority has accepted the petitioners' contention that there cannot be any misstatement or suppression on the part of the petitioners in not disclosing the accumulated CESS in form GSTR 1 and GSTR-3B at the same time the appellate authority has committed serious error in not considering the effect of petitioners' disclosure made in the annual return filed in Form GSTR-9. It is further submitted that the petitioners have also paid the differential sum (i.e. the difference between the ITC available to the petitioners on the CESS paid by them to their supplier and the CESS collected by them from their purchasers) and therefore the error of initial non-disclosure by the petitioners is revenue neutral.

4. In support of his contention he relies on a judgment of the Hon'ble Division Bench of this Court in case of *Ankit Kumar Agarwal vs. Assistant Commissioner of State Tax, Taltala Charge*, reported at (2024)20 Centax 373 (Cal).

5. He also places reliance on a judgment of the Hon'ble High Court at Madras in case of *Sri*

Shanmuga Hardwares Electricals vs. State Tax Officer, reported at (2024) 15 Centax 502 (Mad) and a Co-ordinate Bench decision of this Court in case of *Bisweswar Midhya, Proprietor of Midhya Construction vs. The Joint Commissioner, Haldia CGST & CS Commissionerate and Ors. (in WPA 7161 of 2024, decided on April 5, 2024)*, rendered by relying on the aforesaid judgment in case of *Shanmuga Hardwares Electricals* (supra).

6. Mr. Sanyal, learned Advocate appearing on behalf of the State respondents is quick to point out that the judgment of the Hon'ble Division Bench in its case of *Ankit Kumar Agarwal* (supra) cited by Mr. Kanodia cannot be pressed into service inasmuch as the Hon'ble Division Bench had observed therein that the said order should not be treated as a precedent.

7. He then submits that the petitioners cannot take advantage of the disclosure made by them in the annual return inasmuch as the same had been filed beyond the period prescribed in Section 44(2) of the said Act of 2017 as amended by the Finance Act of 2023.

8. Mr. Sanyal further submits that even prior to the amendment effected to Section 44 by the Finance Act of 2023, the petitioners were obliged

to file annual returns in terms of the explanation given to sub-section (2) thereof, which provided the exact date by which returns were to be furnished.

9. Mr. Kanodia refutes the submissions made by Mr. Sanyal and submits that the provisions of Section 44(2) of the said Act of 2017 would not apply to the present case inasmuch as the same were inserted by the Finance Act of 2023 with effect from October 1, 2023 and that the petitioners had filed their annual return in form GSTR-9 on August 28, 2023 (page 59 of the writ petition) i.e. prior to the said provision taking effect. It is further submitted that it will appear from the records of the appellate authority itself that no question as regards the validity of Form GSTR-9 filed by the petitioners has been raised by the appellate authority and that the appellate authority has rather relied on the said GSTR-9 for the purpose of arriving at a conclusion that the petitioners' case did/does not fall within the scope of Section 74 of the said Act of 2017.

10. Heard the learned Advocates appearing for the respective parties and considered the material on record.

11. In terms of Article 265 of the Constitution of India no tax can be levied or collected except by

authority of law. Now, in view thereof, if the Respondent GST authorities do not take into consideration the petitioners' assertion that the petitioners have not availed ITC on the CESS paid by them on the inward supplies and the petitioners are burdened with CESS collected by them on outward supplies done by them without giving credit to the petitioners for the unavailed ITC in respect of the CESS on inward supplies then, in the considered view of this Court, such act may offend the spirit of Article 265 of the Constitution of India. Therefore, there does not appear to be any convincing reason for the GST Authorities to altogether ignore the effect of Form GSTR-9.

12. As regards the effect of the provisions of Section 44(2) of the said Act of 2017, this Court is of the view that the earlier avatar of Section 44(2) of the said Act of 2017 (i.e. prior to the amendment effected in 2023) there was no prohibition on the petitioners' filing GSTR-9 beyond the prescribed date. This Court agrees with the submissions of Mr. Kanodia that the present mandatory prohibition contained in Section 44(2) of the said Act of 2017 would not apply to the petitioners' case. Since the same have been ordained to take effect from October 01, 2023 by the Finance Act of

2023 whereby the said provision was inserted. Indeed the explanation appended to Section 44(2) of the said Act of 2017 provided for a date by which annual returns were to be filed but then since there was neither any fatal consequence provided for failure to file the same within that time nor was there any negative mandate prohibiting filing of return after a particular period, therefore the same cannot be interpreted in a manner so as to totally preclude late filers from filing the return. In fact the provision for late fees in filing annual return provided in Section 47 of the said Act of 2017 also indicates that total preclusion of late filers was not intended.

13. The submission of Mr. Sanyal that *Ankit Kumar Agarwal* (supra) cannot be cited as precedent, must be accepted inasmuch as the observations of the Hon'ble Division Bench in the case of *Ankit Kumar Agarwal* (supra) to the effect that the order should not be treated as a precedent, are binding on this Court.

14. However, applying the law governing the field to the facts of the present case and especially in view of the mandate of Article 265 of the Constitution of India, even without relying on the said judgment of *Ankit Kumar Agarwal* (supra),

this Court is of the considered view that due regard must be given by the appellate authority to the annual return filed by the petitioner in form GSTR-9 and the payment of the differential sum (i.e. the difference between the ITC available to the petitioners on the CESS paid by them to their supplier and the CESS collected by them from their purchasers) claimed to have been made by the petitioners thereby rendering the error of initial non-disclosure committed by the petitioners in their earlier returns revenue neutral. The appellate authority should, therefore, revisit the matter once again, in accordance with law.

15. For all the reasons aforesaid, the order impugned dated February 6, 2025 passed by the appellate authority is set aside and the matter is remanded to the file of the appellate authority for considering the appeal afresh.

16. WPA 12637 of 2025 stands disposed of. No costs.

(Om Narayan Rai, J.)

