



2024:KER:10314

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

WEDNESDAY, THE 7TH DAY OF FEBRUARY 2024 / 18TH MAGHA, 1945

WP(C) NO. 24810 OF 2023

PETITIONER/S:

FAIZAL TRADERS PVT.LTD., BROTHERS TOWER, ALATHUR PO,
PALAKKAD - 678541, REP BY ARIF K, DIRECTOR.

BY ADVS. P.RAGHUNATHAN
PREMJIT NAGENDRAN; M.SHYLAJA; RISHAL.K

RESPONDENT/S:

- 1 DEPUTY COMMISSIONER,
CENTRAL TAX AND CENTRAL EXCISE, PALAKKAD DIVISION,
METTUPALAYAM STREET, PALAKKAD, PIN - 678001
- 2 CENTRAL BOARD OF INDIRECT TAXES AND CUSTOMS,
DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, NEW DELHI -
110001, BY DIRECTOR.

BY ADVS. SMT.PREETHA S. NAIR, SC, CENTRAL BOARD OF EXCISE
AND CUSTOMS

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
07.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J U D G M E N T

The present writ petition has been filed by the petitioner, a registered dealer under the provisions of the CGST/SGST Act challenging the Order-in-Original No.11/2023/GST dated 21.06.2023 passed by the 1st respondent under Section 73(9) of the CGST Act, whereby the petitioner's claim for input tax credit for an extent of Rs.1,16,75,250/- for the period from July 2017 to September 2017 has been denied. On such ineligible input tax credit, the interest and penalty have been levied by impugned Ext.P1 order.

2. The petitioner is engaged in IHK Service for Southern Railway as also supply of Top-Up Coupon and Recharge Coupon of M/s BSNL as 'Franchisee'. Prior to the GST regime, the petitioner was not liable to pay service tax. However, after the GST Act came into force with effect from 01.07.2017, the petitioner started filing monthly returns in



Forms GSTR-1 and GSTR-3B, from October 2017 and GSTR-9 from March 2018. During July, August and September 2017, the petitioner had received 'inward supplies' from BSNL, and GST was collected. According to the petitioner, the petitioner had effected 'outward supplies' to distributors attracting 'output tax' which had not been disclosed in GSTR-1 and GSTR-3B returns from 09/2017 to 03/2018.

2.1 It is further submitted that, at that time, it was the initial period of rolling out of the GST and Form GSTR-2A, which was auto-populated based on data uploaded by dealers through GSTR-1, was not reflecting the correct input credit available to a recipient of supplies and even module relating to Form GSTR-2A was not available. During the audit of accounts, it was noticed that the petitioner had omitted to report details of 'inward' and 'outward' supplies for July to September 2017, and therefore, these values were shown in its



annual return for 2017-18 in GSTR-9 indicating total 'input credit' and 'output tax'.

2.2 The petitioner received a notice dated 15.02.2023 in Form DRC-01A issued by the 1st respondent intimating the petitioner that the petitioner had not paid GST on outward supplies made from 07/2017 to 09/2017 and directed the petitioner to pay the same with applicable penalty and interest. The petitioner filed a reply to the show cause notice dated 04.03.2023, pointing out that the petitioner had claimed input tax credits for 07/2017 to 09/2017, which were omitted to be reported and set off the same against 'output tax' liability. The petitioner paid Rs.88,386/- each under the CGST and KGST, being the shortfall.

2.3 Another show cause notice dated 16.03.2023 was issued by the 1st respondent proposing to demand Rs.1,16,75,250/- as 'output liability' on the value of outward



supplies for the period 07/2017 to 09/2017, along with interest and penalty. The petitioner filed a reply to the show cause notice refuting the allegations and maintained that the 'output credit' was claimed in GSTR-9, though the same was omitted to be claimed in GSTR-3B up to March 2018. However, such a claim of the petitioner was rejected and the impugned Order-in-Original in Ext.P1 came to be passed, as mentioned above.

3. The petitioner has challenged the assessment order on the ground that the same is barred by limitation. Under Section 73(10) of the GST Act, any proceedings under Section 73(9) are required to be concluded within three years from the last date of filing of GSTR-9 for the relevant year. The last date for filing the return in GSTR-9 was 07.02.2020, and therefore, the last date for completing the proceedings under Section 73(9) and serving the demand notice was 07.02.2023. Ext.P1



order was passed only on 21.06.2023 while DRC-07 raising demand was issued only on 14.07.2023, and therefore, the same is barred by limitation prescribed under the Statute.

3.1 The petitioner has also impugned the notification issued by the 2nd respondent bearing No.13/2022-Central Tax dated 05.07.2022 whereby the time limit specified under sub-section (10) of Section 73 for issuance of the order under sub-section (9) of Section 73 was extended up to 30.09.2023 and notification No.09/2023-Central Tax dated 31.03.2023 whereby the time limit was extended to 31.12.2023. According to the learned Counsel for the petitioner, both these notifications, placed on record as Exts.P7 and P8, purported to be issued under Section 168A of the CGST Act, are beyond the powers conferred on the 2nd respondent under Section 168A of the Act. By taking aid of the aforesaid notifications, the impugned order in Ext.P1 could not have been passed beyond three years





of the limitation prescribed under sub-section (9) of Section 73 of the CGST/SGST Act. The last date for filing annual returns for 2017-18 was 07.02.2023.

3.2 It is further submitted that the *force majeure* was not present for extending the time for completion of proceedings in passing the assessment order under sub-section (9) of Section 73. Thus, the impugned notification is bad in law and is *ultra vires* the provisions of Section 168A of the CGST/SGST Act.

3.3 Learned Counsel for the petitioner furthermore submits that the extension of the time limit for completing the actions can only be notified where such actions cannot be completed due to *force majeure*. The expression '*force majeure*' has been defined in the Explanation of Section 168A, which means war, epidemic, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature or



otherwise affecting the implementation of any of the provisions of the Act. Ext.P7 notification does not indicate any calamity caused by nature or otherwise affecting the passing of Ext.P1 order under Section 73(9) of the GST Act within the time stipulated by the Act. Therefore, the notifications are *ultra vires* and the impugned order in Ext.P1 being time-barred is without jurisdiction.

3.4 The learned Counsel for the petitioner also submits that taking the COVID-19 situation, by notification No.35/2020-Central Tax dated 03.04.2020, issued by the Central Board of Indirect Taxes and Customs, the time period had been extended till 30.06.2020 and by further notification No.14/2021 dated 01.05.2021 the time period was extended to 31.05.2021. Therefore, there was no occasion to extend the further time period by Exts.P7 and P8 as *force majeure*, as defined in the Explanation to Section 168A of the Act, was not



present.

4. The learned Counsel for the petitioner submits that considering the difficulties faced during the initial years of the GST regime for the Financial Year 2017-18 and 2018-19, where there was a difference in input tax credit availed in Form GSTR-3B as compared to the details in Form GSTR-2A the Government had issued Circular No.183/15/2022-GST dated 27.12.2022. It is provided that where the supplier has filed Form GSTR-1 as well as the return in Form GSTR-3B for the tax period, but has failed to report to a particular supply in Form GSTR-1, due to which the said supply does not get reflected in Form GSTR-2A of the recipient, in such cases, the difference in ITC claimed by the registered person in his return in Form GSTR-3B and that available in Form GSTR-2A is required to be handled as per the procedure in paragraph 4 of the said notification.



4.1 Paragraphs 4 and 5 of the said notification are extracted hereunder:

“4. The proper officer shall first seek the details from the registered person regarding all the invoices on which ITC has been availed by the registered person in his FORM GSTR 3B but which are not reflecting in his FORM GSTR 2A. He shall then ascertain fulfilment of the following conditions of Section 16 of CGST Act in respect of the input tax credit availed on such invoices by the said registered person:

- i) that he is in possession of a tax invoice or debit note issued by the supplier or such other tax paying documents;
- ii) that he has received the goods or services or both;
- iii) that he has made payment for the amount towards the value of supply, along with tax payable thereon, to the supplier.

Besides, the proper officer shall also check whether any reversal of input tax credit is required to be made in accordance with section 17 or section 18 of CGST Act and also whether the said input tax credit has been availed within the time period specified under sub-section (4) of section 16 of CGST Act.

4.1.1 In case, where difference between the ITC claimed in FORM GSTR-3B and that available in FORM GSTR 2A of the registered person in respect of a supplier for the said financial



year exceeds Rs 5 lakh, the proper officer shall ask the registered person to produce a certificate for the concerned supplier from the Chartered Accountant (CA) or the Cost Accountant (CMA), certifying that supplies in respect of the said invoices of supplier have actually been made by the supplier to the said registered person and the tax on such supplies has been paid by the said supplier in his return in FORM GSTR 3B. Certificates issued by CA or CMA shall contain UDIN. UDIN of the certificate issued by CAs can be verified from ICAI website <https://udin.icaai.org/search-udin> and that issued by CMAs can be verified from ICMAI website <https://eicmai.in/udin/VerifyUDIN.aspx>.

4.1.2 In cases, where the difference between the ITC claimed in FORM GSTR-3B and that available in FORM GSTR 2A of the registered person in respect of a supplier for the said financial year is upto Rs 5 lakh, the proper officer shall ask the claimant to produce a certificate from the concerned supplier to the effect that said supplies have actually been made by him to the said registered person and the tax on said supplies has been paid by the said supplier in his return in FORM GSTR 3B.

4.2 However, it may be noted that for the period FY 2017-18, as per proviso to section 16(4) of the CGST Act, the aforesaid relaxations shall not be applicable to the claim of ITC made in the FORM GSTR-3B return filed after the due date of furnishing return for the month of September 2018 till the



due date of furnishing return for March, 2019, if supplier had not furnished details of the said supply in his FORM GSTR-1 till the due date of furnishing FORM GSTR 1 for the month of March, 2019.

5. It may also be noted that the clarifications given hereunder are case specific and are applicable to the bonafide errors committed in reporting during FY 2017-18 and 2018-19. Further, these guidelines are clarificatory in nature and may be applied as per the actual facts and circumstances of each case and shall not be used in the interpretation of the provisions of law.”

4.2 He, therefore, submits that the Assessing Officer has not given the petitioner time to comply with the provisions of the Circular; the matter may be remanded back to the Assessing Officer to apply the Circular No.183/15/2022-GST dated 27.12.2022 and pass fresh assessment order.

5. Sub-sections (9) and (10) of Section 73, which are relevant, are extracted hereunder:

“73.(9): The proper officer shall, after considering the



representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order. 73(10): The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund."

6. Thus, from reading the aforesaid provision, it is evident that the order under sub-section (9) of Section 73 is to be issued by the proper officer within a period of three years from the due date for furnishing the annual returns for the financial year. An order passed beyond the period of three years in respect of the financial year from the due date of filing the annual return would become time-barred and without jurisdiction. Section 168A empowers the Government to extend the time limit in special circumstances for actions



which could not be completed due to *force majeure*. This power is overriding power, and sub-section (1) of Section 168A has a non-obstante clause.

6.1 Section 168A on reproduction reads as under:

“Sec. 168A: Power of Government to extend time limit in special circumstances:

[1]: Notwithstanding anything contained in this Act, the Government may on the recommendations of the Council, by notification, extend the time limit specified in, or prescribed or notified under, this Act in respect of actions which cannot be completed or complied with due to *force majeure*.

[2]: The power to issue notification under sub-section [1] shall include the power to give retrospective effect to such notification from a date not earlier than the date of commencement of this Act.

Explanation: For the purposes of this section, the expression "*force majeure*" means a case of war, epidemic, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature or otherwise affecting the implementation of any of the provisions of this Act.”

6.2 Thus, if there is *force majeure* as defined in Section



168A, the Government is empowered to extend the limitation period for taking actions which could not be completed or complied with due to *force majeure*. No one can deny that COVID-19 was a *force majeure* as it was a pandemic that caused large-scale human tragedy and suffering all over the world and paralyzed the world, including economic activities.

7. The notifications in Exts.P7 and P8 were issued by the Central Government on the recommendation of the GST Council based on a *suo motu* order passed by the Supreme Court in consideration of the COVID-19 pandemic. The GST Council, in its 47th meeting held on 28th and 29th June 2022 took note of the effect of the Covid-19 pandemic and agreed with the recommendation of the Law Committee. It was observed that the Central and the State Governments were working with reduced staff, along with staggered timings and exemption to certain categories of employees from attending offices, from



time to time during the COVID period. A conscious policy decision was taken not to do enforcement actions in the initial period of implementation of the GST law. Therefore, no action for scrutiny, audit, etc., could be undertaken during the initial period of GST implementation. As the due date for filing the annual return for Financial Year 2017-18 was 07.02.2020, based on which limitations for demand under the Act are linked. As Covid happened immediately after that, thereby the audit and scrutiny for the Financial Year 2017-18 were impeded due to the various restrictions during the Covid period. Therefore, the decision was taken to extend the limitation under Section 73 for the Financial Year 2017-18 for issuance of the order in respect of demand linked with due date of annual return till 30.09.2023 under the powers available under Section 168A of the GST Act.

8. How much time could have been extended



considering the pandemic is the discretion of the Executive, which has been taken based on the recommendation of the GST Council. I do not find that the notifications impugned in the writ petition in Exts.P7 and P8 are *ultra vires* the provisions of Section 168A of the CGST/SGST Act. The Government is well within the power to extend the limitation for completing the proceedings and taking action under Section 73 of the Act by issuing notification under Section 168A of the GST Act if there is *force majeure*. COVID-19 was a force majeure, and taking into account the various factors, the time limit has been extended. Therefore, I find no substance in the challenge to the said notifications, and the writ petition is dismissed to that extent.

8.1 As the Government itself has come out with Circular No.183/15/2022-GST dated 27.12.2022 to deal with the difference in Input Tax Credit availed in Form GSTR-3B as compared to that detailed in Form GSTR-2A for the Financial



Year 2017-18 and 2018-19, I find that in the case of the petitioner also the benefit of the said Circular should be given and the assessment order to be passed afresh. Thus, the Assessment Order is set aside, and the matter is remanded back to the Assessing Authority to pass a fresh Assessment Order giving the benefit of Circular No.183/15/2022-GST dated 27.12.2022. The petitioner is directed to appear on 26.02.2024 before the Assessing Authority with all the relevant documents to claim the benefit of Circular No.183/15/2022-GST. The Assessing Authority shall consider the submissions and documents and then finalize a fresh Assessment Order.

The writ petition stands allowed to this extent with the above observations. No order as to costs.

sd/-

DINESH KUMAR SINGH

JUDGE



APPENDIX OF WP(C) 24810/2023

PETITIONER EXHIBITS

Exhibit -P-1	ORDER IN ORIGINAL NO.11/2023/GST DT 21.06.2023 AND FORM GST DRC 07 DT.14.07.2023
Exhibit-P-2	ANNUAL RETURN FOR 2017.18 IN FORM 9
Exhibit-P-3	NOTICE IN FORM DRC 01A DT. 15.02.2023 ISSUED BY SECOND RESPONDANT
Exhibit-P-4	REPLY DT. 04.03.2023 TO EXT. P-3
Exhibit-P-5	SHOW CAUSE NOTICE DT. 16.03.2023 ISSUED BY FIRST RESPONDENT
Exhibit- P-6	REPLY DT. 20.05.2023 TO EXT.P-5 SCN
Exhibit-P-7	NOTIFICATION NO. 13/2022 -CENTRAL TAX DT. 05.07.20222

RESPONDENT EXHIBITS

Ext-P-11	Screen Shot of GSTR 2A for 2017.18
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PETITIONER EXHIBITS

Exhibit-P-8	NOTIFICATION NO. 09/2023 -CENTRAL TAX DT. 31.03.2023
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RESPONDENT EXHIBITS

Ext-P-9	Notification No. 35/2020-Central Tax dt.: 03.04.2020
Ext-P-10	Notification No. 14/2021-Central Tax dt.: 01.05.2021
Exhibit R1 (a)	TRUE COPY OF THE MINUTES OF THE 47 TH MEETING



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OF GST COUNCIL HELD ON 28 & 29 JUNE 2022

Exhibit R 1 (b)

TRUE COPY OF THE PRESS RELEASE OF THE 47 TH
MEETING

PETITIONER EXHIBITS

Exhibit -P 12

Circular No. 157/13/2021-GST dtd 20.07.2021

Exhibit-P 13

Judgement in RUNGTA MINES LIMITED Vs THE STATE
OF JHARKHAND AND ORS