

THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.03.2023

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.No.8493 of 2023
and WMP No.8686 of 2023

Pinstar Automotive India Pvt. Ltd.,
A-11, SIPCOT Industrial Growth Centre
Oragadam, Mathur Post
Kanchipuram, Tamil Nadu – 602 105.

... Petitioner

Vs

Additional Commissioner,
Office of the Commissioner of GST and Central Excise
Chennai – Outer Commissionerate
Newry Towers, No.2054-1: II Avenue
Anna Nagar, Chennai – 600 040.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records in the impugned order bearing reference number F.No.GEXCOM/ADJN/GST/ADC/118/2021-ADJN dated 20.01.2023 passed by the respondent and quash the same and remand the matter back to the file of the respondent to consider the matter afresh after providing opportunity for being heard, in accordance with law.

For Petitioner : Mr.V.Veeraraghavan

For Respondent : Mr.Ramesh Kutty
Senior Panel Counsel

ORDER

Mr.Ramesh Kutty, learned Senior Panel Counsel accepts notice for the respondent and is armed with instructions to enable this Court to dispose the matter finally, even at the stage of admission.

2. The petitioner is an assessee on the file of the respondent for the purposes of Central Goods and Services Tax Act, 2017 (in short 'Act') in relation to the period of assessment July, 2017 to March, 2019. The petitioner had received pre-assessment notice dated 17.09.2021 in regard to the issue relating to invocation of Section 16(2)(c) of the Act.

3. The case of the respondent is as follows:

(i) Certain supplies had been made to the petitioner by third parties and the petitioner has averred that the entirety of the amount including tax has been paid to the suppliers.

(ii) While this is so, it is the stand of the petitioner that those suppliers are delinquent insofar as that their registrations have been cancelled and the tax paid by the petitioner has not been remitted by them to the Department.

4. Section 16 deals with the eligibility and conditions for taking Input Tax Credit (ITC). Sub-section (2) of Section 16 sets out certain mandatory

contingencies for continuity of ITC to a registered person. Inter alia, one of the conditions is that the tax charged in respect of such supply has been actually paid to the Government in cash or through utilisation of ITC, admissible in respect of the said supply.

5. Thus, and undoubtedly, there is a mandate cast upon the petitioner/claimant to ITC to ensure compliance with the provisions as, in the alternative and as a natural consequence of Section 16(2)(c), he would be entitled to ITC.

6. No fault can be attributed to the Department in this regard, since three suppliers, Techno Rubber Plastic and Co., Techno Rubber and Plastic and M/s.Unique Autoplastics Private Limited had uploaded their invoices in GSTR -1, but no tax had been remitted by them, since GSTR 3B had not filed by them. The petitioner, as a consequence, suffered reversal of ITC, IGST, CGST and SGST.

7. Per contra, it was the stand of the petitioner that they had fulfilled all the conditions stipulated under the Statute and had adduced proof for payment of consideration within a period of 180 days and therefore, they are eligible to ITC. The stand was rejected by the respondent who passed an order-in-original on 27.07.2022 confirming the demand proposed in the show cause notice. Inter

alia, the assessing authority has confirmed the addition proposed under the show cause notice.

8. This order has become final, the petitioner preferring to make an application for rectification of errors apparent on the face of the record under Section 161 of the Act. Since the application of the petitioner proceeded on the basis that the respondent had not referred to the following decisions in dealing with the issue, they were of the view that the provisions of Section 161 were applicable.

i) *Arise India Limited V. Commissioner of Trade and Taxes* (TS-314-HC-2017 (Del) – VAT)

ii) *Shri Ranganathar Valves Private Limited V. Assistant Commissioner (CT)* (2020-TIOL-1611-HC-Mad-VAT)

iii) *CC & CCE V. M/s.Juhi Alloys Limited* (Excise Appeal No. 3625 3627 of 2010-Ex (SM), CESTAT, Delhi, dated 01.07.2013)

iv) *Commissioner of Central Excise, Jalandhar V. M/s.Kay Kay Industries* (AIT-2013-147-SC)

9. There can be no dispute on the position that the provisions of Section 16 are to be observed strictly, such that, there is no jeopardy to the interests of the revenue. The provisions of the Central Goods and Services Tax Act, 2017 has, assimilating wisdom of experience from the erstwhile tax regimes, gone

one step further to ensure that the interests of the revenue are protected by providing for a mandate that the tax liability is defrayed/met either at the hands of the supplier or the purchaser, the petitioner in this case. Thus, no fault can be attributed to the revenue in this regard.

10. An additional factor is that where the tax liability has been met by way of reversal of ITC and similarly recovery is effected from the supplier as well, this would amount to a double benefit to the revenue. Thus, while the Department may reverse credit in the hands of the purchaser, this has to be a protective move, to be reversed and credit restored if the liability is made good by the supplier. Thus, the substantive liability falls on the supplier and the protective liability upon the purchaser. A mechanism must be put in place to address this situation.

11. In the present case, the petitioner has chosen to seek rectification of order-in-original dated 29.07.2022 based upon the aforesaid decisions. The Court has no intention of intervening in the conclusion of the assessing authority on this aspect. However, the procedure followed by the authority is clearly contrary to the third proviso to Section 16 of the Act that necessitates that, where the authority proposes to take a view adverse to the applicant, due process must be followed.

Dr.ANITA SUMANTH,J.

In this case, admittedly, there has been no opportunity granted to the petitioner prior to the passing of impugned order dated 20.01.2023 and this is a fatal flaw. Order dated 20.01.2023 is set aside. The petitioner shall be heard by issue of notice and orders passed on the Section 161 application within a period of four (4) weeks from today.

13. This Writ Petition is allowed. No costs. Connected Miscellaneous Petition is closed.

20.03.2023

Index : Yes / No
Speaking/non-speaking Order
Neutral Citation:Yes/No
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To

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