[i]CASE NO W.P.(MD) Nos.2127 of 2021
BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
ORDER BY THE HONOURABLE MR. JUSTICE G.R. SWAMINATHAN
ORDER DATE 24.02.2021

[Writ petition under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus]

- M/s.D.Y.Beathel Enterprises- Recipient of goods & claimed ITC.
  [Termed as **"Petitioner"]**
- Charles and his wife Shanthi- Supplier of goods
  [Termed as **"Supplier"]**
- The State Tax Officer (Data Cell), (Investigation Wing) Tirunelveli.
  [Respondent Termed as **"IA"]**

FACTS OF THE CASE

- Petitioner is a trader in Raw Rubber Sheets & had purchased goods from supplier.
- Petitioner paid substantial portion of the sale consideration through banking channels which included the tax component also. Supplier is registered with the very same assessment circle.
- Based on the returns filed by the supplier, the petitioner availed ITC.
- Later, during inspection by IA, it came to light that supplier, did not pay any tax to the Government which necessitated initiation of these proceedings.
- IA issued show cause notices to petitioner, who submitted the reply specifically taking the stand that all the amounts payable by them had been paid to the said supplier and requested IA for confrontation of supplier during enquiry.
- Unfortunately, without involving the said supplier, the impugned orders came to be passed levying the entire liability on the petitioner herein.
- The said order under challenge in this writ petition.

IA'S ARGUMENTS

- Petitioners availed ITC on the premise that tax had already been remitted to the Government, by supplier but they have not paid any tax and the petitioner could not furnish any proof for the same. Hence department was entirely justified in proceeding to recover the same from the petitioner herein.
- IA cannot be faulted for having reversed whatever ITC that was already availed by the petitioner herein.

PETIOTIONER'S ARGUMENTS

- Petitioner took the court to decision of the **Madras High Court made in Sri Vinayaga Agencies Vs. The Assistant Commissioner, CT Vadapalani, reported in 2013 60 VST page 283** wherein it was held that *"the authority does not have the jurisdiction to reverse the input tax credit already availed by the assesses on the ground that the selling dealer has not paid the tax. I am afraid that this proposition laid down in the context of the previous tax regime may not be straight-away applicable to the current tax regime"*.

- Petitioner took the court to one GST Council [ii]press release dated 04.05.2018, the extract of relevant portion is as reproduced below-

> ***(iv) No automatic reversal of credit***
> *There shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc."*

HONOURABLE JUSTICE'S OBSERVATIONS
[starting from para 10 of the order]

- Referred & reproduced relevant statutory provisions section 16 of TNGST Act, 2017.

- As per provisions, assessee must have received the goods and the tax charged in respect of its supply, must have been actually paid to the Government either in cash or through utilization of input tax credit, admissible in respect of the said supply.

- Therefore, if the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one party, either the seller or the buyer. **In the case on hand, IA does not appear to have taken any recovery action against the supplier, on the present transactions.**

- As petitioner draws my attention to the order of IA, dated 27.10.2020, finalising the assessment of the supplier **by excluding the subject transactions alone**. I am unable to appreciate the approach of the authorities. **When it has come out that the supplier has collected tax from petitioner, the omission on the part of the supplier to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him.**

- **That apart in the enquiry in question, supplier ought to have been examined. They should have been confronted**. This is more necessary, because IA has taken a stand that the petitioner have not even received the goods and had availed input tax credits on the strength of generated invoices.

ORDER [Para 15-17]

- According to IA, there was no movement of the goods. Hence, examination of supplier has become more necessary and imperative. When the petitioner has insisted on this, I do not understand as to why IA did not ensure the presence of supplier, in the enquiry. Thus, the impugned orders suffer from certain fundamental flaws. It must be quashed for more reasons than one.
  a) Non-examination of supplier in the enquiry.
  b) Non-initiation of recovery action against supplier in the first place.

- Therefore, the impugned orders are quashed, and the matters are remitted back to the file of IA. The stage up-to the reception of reply from the petitioner herein will hold good.

- ***Enquiry alone will have to be held afresh. In the said enquiry, supplier will have to be examined as witnesses. Parallelly, IA will also initiate recovery action against supplier.***

- With these directions, these writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

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[i] Download copy of the order- click here
[ii] GST Council Press Release – click to download