

HIGH COURT OF ANDHRA PRADESH

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WRIT PETITION No. 28743 of 2023

Between:

Tikona Infinet Private Limited

.....PETITIONER

AND

The State of Andhra Pradesh,
Represented by its Principal Secretary,
Department of Revenue CT-I,
Secretariat, Velagapudi, Guntur District,
Andhra Pradesh and 2 others

.....RESPONDENTS

DATE OF JUDGMENT PRONOUNCED: **09.11.2023**

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE RAVI NATH TILHARI
&
THE HON'BLE SRI JUSTICE A V RAVINDRA BABU**

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|---|--------|
| 1. Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2. Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/No |
| 3. Whether Your Lordships wish to see the fair copy of the Judgment? | Yes/No |

RAVI NATH TILHARI, J

A V RAVINDRA BABU, J

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! Counsel for the Petitioner : Sri Kalepu Yashwanth

Counsel for the Respondents : Sri S A V Saikumar,
AGP for Commercial Taxes

< Gist :

> Head Note:

? Cases Referred:

1. 2021 SCC OnLine SC 884
2. Writ Tax No.859 of 2023, decided on 25.07.2023
Neutral Citation No.2023:AHC:152051-DB
3. WP.No.12190/2019, decided on 14.03.2022
High Court of Judicature for Rajasthan at Jodhpur
4. 2023 (8) TMI 1212 AP HC
5. 2019 SCC OnLine AP 281
6. (2004) 3 SCC 440
7. (2020) 12 SCC 572

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&
THE HON'BLE SRI JUSTICE A V RAVINDRA BABU**

WRIT PETITION No. 28743 of 2023

JUDGMENT: (per Hon'ble Sri Justice Ravi Nath Tilhari)

Heard Sri Kalepu Yashwanth, learned counsel for the petitioner and Sri S A V Saikumar, learned AGP for Commercial Taxes.

2. The petitioner –Tikona Infinet Private Limited (TIPL) has filed this writ petition for a Writ of Mandamus under Article 226 of the Constitution of India, to declare the impugned show cause notice in Form GST DRC-01, dated 29.09.2023 bearing DIN No.ZD370923020771D issued by the 3rd respondent- the Deputy Assistant Commissioner, State Taxes, Dabagardens Circle, Visakhapatnam-1 Division, Andhra Pradesh, as illegal, arbitrary and in contravention of the Central Goods and Services Tax (CGST) / Andhra Pradesh Goods and Services Tax (APGST) Act and Rules, and consequently to set aside the same.

3. The petitioner has prayed for a further declaration that the Input Tax Credit (ITC) claim cannot be denied on the basis of transfer done manually and not by filing Form GST-ITC 02 electronically under Section 18 (3) of CGST Act read with Rule 41 of the CGST Rules, as functionality to file Form GST-ITC 02 electronically was absent.

4. The petitioner/TIPL is a Company registered under the Companies Act, 1956 and is *inter alia* engaged in providing internet services across India

from various States, including from the State of Andhra Pradesh. The 3rd respondent-the Deputy Assistant Commissioner, State Taxes issued show cause notice in From GST DRC-01, dated 29.09.2023 bearing DIN No.ZD370923020771D, impugned in the present petition. The said notice was issued, in view of the fact that the 3rd respondent concluded that the petitioner claimed ITC for Rs.31,81,529/- in contravention of the provisions of Section 16 of the APGST Act 2017, and therefore, it was proposed to levy Rs.31,81,529/- towards excess claim of input tax more than the eligibility as per the provisions of the APGST Act 2017. It was also proposed that the petitioner was liable to pay Rs.38,46,389/- towards the discrepancies identified in the said notice. The petitioner was also informed that he was liable to pay interest under Section 50 of the GST Act 2017 towards the short payment of taxes. By the impugned show cause notice, the petitioner has been granted opportunity to file objections, if any, along with the documentary evidence, within a specified time from the date of receipt of the notice, which further provides that failing which, orders deemed fit would be passed without further notice or time. The petitioner has also been provided to express the desire to be represented personally on the date fixed under prior intimation.

5. The facts are that the petitioner/TIPL entered into a Business Transfer Agreement (BTA), dated 17.08.2017 with Tikona Digital Networks (TDN), vide which the business of TDN was transferred to the petitioner, as a going concern. It is submitted that the TDN filed letter dated 13.09.2017 to the Commercial Tax Officer intimating that as per Rule 41 (1) of CGST Rules, a

registered person intending to transfer the input tax credit is required to file GST-ITC 02 on the common portal to the transferee and TDN intended to transfer unutilized credit in the electronic credit ledger of TDN on the date of slump sale to TIPL, but Form ITC-02 was not available on GSTN portal, and consequently, TDN was not able to transfer on GSTN portal and TIPL was unable to utilize the credit balance appearing in the electronic credit ledger of TDN. Consequently, it was requested to let TDN know the procedure to be followed for transfer of credit from TDN to TIPL under the circumstances. It is further submitted that the petitioner/TIPL also submitted letter dated 12.02.2018 to the jurisdictional authority duly intimating about the transfer of ITC to TDN manually. A certificate dated 09.02.2018 by the Chartered Accountant certifying the transfer of business is also said to have been issued.

6. The Assistant Commissioner (ST), Dabagardens, Visakhapatnam issued notice GST ASMT-10, bearing Reference No.ZD370423019170U, dated 11.04.2023, intimating the discrepancy in the return after scrutiny (scrutiny notice) and calling for the explanation for such discrepancy. The petitioner submitted the reply/explanation dated 16/17.05.2023. On consideration of the petitioner's reply, the impugned show cause notice dated 29.09.2023 has been issued, granting opportunity to file objections along with documentary evidence, as also providing personal hearing, if so desired.

7. Sri S A V Saikumar, learned AGP for Commercial Taxes, raised preliminary objection that the writ petition challenging the show cause notice is premature and is not entertainable. The petitioner has the opportunity to

submit the explanation, to lead the evidence before the 3rd respondent, as also to avail the opportunity of personal hearing and it is only after the petitioner avails such opportunity, and if then some adverse decision is taken, the petitioner can challenge the same in appropriate proceedings under statutory provisions. But bypassing such procedure and the remedy, writ petition filed directly to challenge the show cause notice would not be maintainable. He placed reliance in the judgment of the Hon'ble Apex Court in the case of ***Assistant Commissioner of State Tax v. M/s. Commercial Steel Limited¹***.

8. To the aforesaid submissions, Sri Kalepu Yashwanth, learned counsel for the petitioner, submitted that in view of the admitted position that the petitioner filed, manually and not electronically the Form GST – ITC 02, as provided by Section 18 (3) of the CGST Act, read with Rule 41 of CGST Rules, the 3rd respondent would not consider such filing and would hold that the petitioner would not be entitled for ITC claim, and consequently, approaching the 3rd respondent with the objections and the evidence would be in futility. He submitted that the petitioner had the justification for not filing Form GST-ITC 02 electronically, as the same was not available on the portal and consequently, this Court may direct the 3rd respondent to take into consideration the manual filing, reading down the provision for electronically filing and if the same is considered, the petitioner would be entitled for the ITC claim and in transfer thereof, there was no violation or illegality and consequently, there would be no

¹ 2021 SCC OnLine SC 884

liabilities, for which the impugned notice has been issued. He submitted that the petitioner, as also the petitioner's transferor, previously vide letters, referred to above, intimated the said fact to the adjudicating authority.

9. He further submitted that under the same circumstances, the same petitioner filed Writ Tax No.859 of 2023, Neutral Citation No.2023:AHC:152051-DB. ***M/s.Tikona Infinet Private Limited v. State of U.P and another***², before the Division Bench of the Allahabad High Court which set aside the Order dated 17.04.2023, which was passed against the same petitioner, and directed the Authority to pass fresh orders taking into consideration the objections of the petitioner and also affording opportunity of hearing, strictly in accordance with law, vide judgment and order dated 25.07.2023.

10. Learned counsel for the petitioner further submitted that under the same circumstances, where Form GST-ITC 02 for transfer of input tax credit electronically could not be done due to non availability of GST-ITC 02 on the Portal and manual filing was done, the High Court of Judicature for Rajasthan at Jodhpur in Civil Writ Petition No.12190/2019, between ***Pacific Industries Ltd. v. Union of India***³, allowed the said petition on 15.03.2022, and directed the respondents therein to regularize the input tax credit in favour of the petitioner therein, as per the entitlement.

11. Learned counsel for the petitioner also placed reliance in the case of this Court in ***K.V.Reddy Granites and Exports v. the State of Andhra***

² Writ Tax No.859 of 2023, decided on 25.07.2023
Neutral Citation No.2023:AHC:152051-DB

³ WP.No.12190/2019, decided on 14.03.2022
High Court of Judicature for Rajasthan at Jodhpur

Pradesh, the Additional Commissioner (State Tax)⁴ to contend that in the said case, the appeal was filed manually and the same was rejected on the said ground that it was not filed electronically, but this Court allowed the writ petition and set aside the order of rejection, holding that even if the appeal was not filed electronically, but manually, the right of appeal being a valuable right, consideration of the appeal could not be denied on the principle that when substantial justice is pitted against technical considerations, it would be always necessary to prefer the ends of justice. He has further placed reliance on the judgment of the Andhra Pradesh High Court in **Sri Siddhi Kalko Bhagavan Stone Crusher v. Asst. Commr. of S.T, Vizianagaram**⁵ to the same effect, as the judgment in **K.V.Reddy Granites and Exports** (supra).

12. The submission of the learned counsel for the petitioner therefore is that the writ petition deserves to be entertained and the prayer as made deserves to be allowed.

13. Sri S A V Saikumar, learned AGP for Commercial Taxes submitted that the Government of India, Ministry of Finance, Department of Revenue, Central Board of Indirect Taxes and Customs issued Circular No.39/13/2018-GST, F.No.267/7/2018-CX.8, dated 03.04.2018, on the subject of setting up of an IT Grievance Redressal Mechanism to address the grievances of taxpayers due to technical glitches on GST portal. He submits that in case of any grievance due to technical glitches, the tax payer has to follow the procedure prescribed therein by filing an appropriate application before the authorities

⁴ 2023 (8) TMI 1212 AP HC

⁵ 2019 SCC OnLine AP 281

mentioned there under, but any such application or grievance was not raised, and raising grievance before the commissioner/tax officer is not before the appropriate authority to redress such grievance. Consequently, his submission is that as to whether the electronically filing on GST-ITC 02 was available or not or there was some error, due to which it could not be filed, is a question of fact, which deserves to be decided by the Authority. If the petitioner has any such grievance, the same may also be raised while filing objections pursuant to the notice and the authority competent to look in that aspect shall consider the same as well.

14. To the aforesaid submissions, learned counsel for the petitioner submitted that the said Circular is dated 03.04.2018, whereas the relevant period with respect to the petitioner's grievance pertains to the year 2017.

15. Learned AGP for Commercial Taxes then submitted that even at that time, the grievance could be raised before the authority competent, but not before the Commissioner.

16. We have considered the submissions advanced and perused the material on record.

17. There is no dispute on the factual aspect that the petitioner claimed ITC, but did not file GST-ITC 02 electronically as per Section 18 of CGST Act and Rule 41 of the CGST Rules 2017.

18. There is also no dispute on the legal position that it was required to be filed electronically in GST-ITC 02 Form as per the aforesaid provisions.

19. Section 18 of CGST Act 2017 reads as under:

“Section 18: Availability of credit in special Circumstances:

(1) Subject to such conditions and restrictions as may be prescribed---

(a) a person who has applied for registration under this Act within thirty days from the date on which he becomes liable to registration and has been granted such registration shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date from which he becomes liable to pay tax under the provisions of this Act;

(b) a person who takes registration under sub-section (3) of section 25 shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the day immediately preceding the date of grant of registration;

(c) where any registered person ceases to pay tax under section 10, he shall be entitled to take credit of input tax in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods on the day immediately preceding the date from which he becomes liable to pay tax under section 9: Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed;

(d) where an exempt supply of goods or services or both by a registered person becomes a taxable supply, such person shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock relating to such exempt supply and on capital goods exclusively used for such exempt supply on the day immediately preceding the date from which such supply becomes taxable: Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed.

(2) A registered person shall not be entitled to take input tax credit under sub-section (1) in respect of any supply of goods or services or both to him

after the expiry of one year from the date of issue of tax invoice relating to such supply.

(3) Where there is a change in the constitution of a registered person on account of sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer the input tax credit which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.⁴

(4) Where any registered person who has availed of input tax credit opts to pay tax under section 10 or, where the goods or services or both supplied by him become wholly exempt, he shall pay an amount, by way of debit in the electronic credit ledger or electronic cash ledger, equivalent to the credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock and on capital goods, reduced by such percentage points as may be prescribed,⁵ on the day immediately preceding the date of exercising of such option or, as the case may be, the date of such exemption: Provided that after payment of such amount, the balance of input tax credit, if any, lying in his electronic credit ledger shall lapse.

(5) The amount of credit under sub-section (1) and the amount payable under sub-section (4) shall be calculated in such manner as may be prescribed.⁶

(6) In case of supply of capital goods or plant and machinery, on which input tax credit has been taken, the registered person shall pay an amount equal to the input tax credit taken on the said capital goods or plant and machinery reduced by such percentage points as may be prescribed⁷ or the tax on the transaction value of such capital goods or plant and machinery determined under section 15, whichever is higher:

Provided that where refractory bricks, moulds and dies, jigs and fixtures are supplied as scrap, the taxable person may pay tax on the transaction value of such goods determined under section 15.”

20. Rule 41 of the CGST Rules 2017 reads as under:

“Rule-41 Transfer of credit on sale, merger, amalgamation, lease or transfer of a business:

(1) A registered person shall, in the event of sale, merger, de-merger, amalgamation, lease or transfer or change in the ownership of business for any reason, furnish the details of sale, merger, de-merger, amalgamation, lease or transfer of business, in [FORM GST ITC-02](#), electronically on the common portal along with a request for transfer of unutilized input tax credit lying in his electronic credit ledger to the transferee:

Provided that in the case of demerger, the input tax credit shall be apportioned in the ratio of the value of assets of the new units as specified in the demerger scheme.

Explanation: – For the purpose of this sub-rule, it is hereby clarified that the “**value of assets**” means the value of the entire assets of the business, whether or not input tax credit has been availed thereon.”.

(2) The transfer or shall also submit a copy of a certificate issued by a practicing chartered accountant or cost accountant certifying that the sale, merger, de-merger, amalgamation, lease or transfer of business has been done with a specific provision for the transfer of liabilities.

(3) The transferee shall, on the common portal, accept the details so furnished by the transfer or and, upon such acceptance, the un-utilized credit specified in [FORM GST ITC- 02](#) shall be credited to his electronic credit ledger.

(4) The inputs and capital goods so transferred shall be duly accounted for by the transferee in his books of account.”

21. The question, if electronically filing in GST-ITC 02 could not be because of some technical error, non-availability on GST portal of such Form at the relevant point of time, is a question, which can be duly considered and decided if such plea is taken in the objections pursuant to the show cause notice, by the competent authority. Even if it could not be filed electronically for the reason as mentioned in the letter of the petitioner and also of TDN and manual filing could have been done or the petitioner could have waited for some period for availability of GST-ITC 02 Form on the portal, is also a question, which can be considered and decided by the competent authority. By the show cause notice, the petitioner has been afforded opportunity to file objections and also to file evidence. The petitioner by taking such objection and by filing evidence, of non-availability of Form GST-ITC 02 on the GST portal at that point of time with supporting documents, as also the evidence of manual filing and showing his entitlement for such ITC can pursue its claim for ITC. If such evidence is filed and if the petitioner appears before the authority for personal hearing and files such evidence, this Court do not see any reason as to why the authority will not consider the same and taking a reasonable view of the matter would not pass appropriate orders, in accordance with law. To contend that in view of rule position, the authority would not consider the manual filing and in the absence of the electronically filing, would not allow the claim, is too early and appears to us a mere apprehension, inasmuch as the authority which has to pass the order after affording the opportunity of hearing based on evidence placed and on consideration of the objections, is expected to

decide the same reasonably, in fairness and for the reasons recorded. If still the petitioner feels aggrieved, the Statute provides for the remedy and in the absence of statutory remedy or equally efficacious alternative remedy, the person aggrieved can also approach this Court under Article 226 of the Constitution of India.

22. We do not find any reason, at this stage of the issuance of show cause notice, particularly, when there is no challenge to the jurisdiction of the authority issuing the show cause notice, as also in the absence of any argument challenging the notice on such grounds, on which the judicial review may be open against the show cause notice, to entertain the writ petition.

23. In ***M/s. Commercial Steel Limited*** (supra), upon which learned AGP placed reliance, the Hon'ble Apex Court, on the point of maintainability of the writ petition under Article 226 of the Constitution of India, held that the existence of an alternate remedy is not an absolute bar to the maintainability of writ petition under Article 226 of the Constitution of India, but a writ petition can be maintained in exceptional circumstances where there is; (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation. However, finding that in the said case none of the exceptions was established, it was held that it was not appropriate for the High Court to entertain the writ petition.

24. It is apt refer paragraphs 11 and 12 of the judgment in ***M/s. Commercial Steel Limited*** (supra) as under:

“**11.** The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:

- (i) a breach of fundamental rights;
- (ii) a violation of the principles of natural justice;
- (iii) an excess of jurisdiction; or
- (iv) a challenge to the vires of the statute or delegated legislation.

12. In the present case, none of the above exceptions was established. There was, in fact, no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance. In this backdrop, it was not appropriate for the High Court to entertain a writ petition. The assessment of facts would have to be carried out by the appellate authority. As a matter of fact, the High Court has while doing this exercise proceeded on the basis of surmises. However, since we are inclined to relegate the respondent to the pursuit of the alternate statutory remedy under Section 107, this Court makes no observation on the merits of the case of the respondent.”

25. The submission of the learned AGP based on the aforesaid judgment is that the petitioner’s case is not covered under any of the exceptions to maintain the writ petition. There is no dispute on such position of law regarding maintainability of writ petition. Any argument, except the mentioned above, has not been advanced by the learned counsel for the petitioner so as to attract the exceptions.

26. In ***Special Director v. Mohd. Ghulam Ghouse***⁶ the Hon'ble Apex Court deprecated the practice of High Courts entertaining writ petitions questioning the legality of show cause notices stalling enquiries as proposed and retarding investigative process. The Hon'ble Apex Court held that unless the High Court is satisfied that the show cause notice was totally *non est* in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, the writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition.

27. It is apt to refer paragraph-5 of ***Mohd. Ghulam Ghouse*** (supra) as under:

“5. This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory

⁶ (2004) 3 SCC 440

functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted.”

28. In ***CCE v. Krishna Wax (P) Ltd.***⁷ the Hon'ble Apex Court reiterated that it is well settled that writ petition should normally not be entertained against mere issuance of show cause notice. The said matter pertained to the Central Excise Act. It was held that excise law is a complete code in itself and it would normally not be appropriate to writ court to entertain writ petition under Article 226 of the Constitution of India and that the person concerned must first raise all the objections before the authority who had issued the show cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order is passed against such person.

29. It is apt to refer paragraphs-14 and 15 of ***Krishna Wax (P) Ltd.*** (supra) as under:

“14. It has been laid down by this Court that the excise law is a complete code in itself and it would normally not be appropriate for a writ court to entertain a petition under Article 226 of the Constitution and that the person concerned must first raise all the objections before the authority who had issued a show-cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order was passed against such person. For example in *Union of India v. Guwahati Carbon Ltd.* [*Union of India v. Guwahati Carbon Ltd.*, (2012) 11 SCC 651] , it was concluded; “The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under

⁷ (2020) 12 SCC 572

Article 226 of the Constitution”, while in *Malladi Drugs & Pharma Ltd. v. Union of India* [*Malladi Drugs & Pharma Ltd. v. Union of India*, (2020) 12 SCC 808] , it was observed:

“... The High Court, has, by the impugned judgment held that the appellant should first raise all the objections before the Authority who have issued the show-cause notice and in case any adverse order is passed against the appellant, then liberty has been granted to approach the High Court ...

... in our view, the High Court was absolutely right in dismissing the writ petition against a mere show-cause notice.”

15. It is thus well settled that writ petition should normally not be entertained against mere issuance of show-cause notice. In the present case no show-cause notice was even issued when the High Court had initially entertained the petition and directed the Department to prima facie consider whether there was material to proceed with the matter.”

30. In the present case, APGST Act is also a complete code and consequently, we are of the considered view that the petitioner should respond to the show cause notice raising all such objections, as may be raised before the authority issuing the show cause notice and in case any adverse order is passed and the petitioner feels aggrieved, the petitioner may then have recourse to the appropriate proceedings.

31. Any provision that if under the circumstances as stated by the learned counsel for the petitioner and mentioned in the letter of the petitioner filed before the assessing authority, if electronically filing was not possible, and consequently, the manual filing was done, the manual filing would not be taken into consideration, has not been brought to our notice.

32. In *M/s.Tikona Infinet Private Limited* (supra), the Allahabad High Court, no doubt set aside the order passed therein but with direction to the respondents therein to pass fresh orders taking into consideration the objections of the petitioner therein, and from reading of the said judgment, what transpires to us, is that the said order was passed as the Allahabad High Court found that the objections filed by the petitioner therein were not considered by the 2nd respondent therein and the order was passed on technicalities by the said respondent. Thus, in the said case, the objection was filed before the authority and the same was rejected on technicalities and challenging the order passed, Writ Tax was filed. In the present case, there is no final order by the authority rejecting the objections of the petitioner on technicalities. At this stage, it is only the apprehension of the petitioner that it may be rejected on technicalities. On a mere apprehension of such a nature, the writ petition is not to be entertained.

33. A perusal of the order of the Allahabad High Court further shows as under:

“Be that as it may, we find that the petitioner has been non suited on the ground that Form ITC 02 for transfer of input tax credit was not available on the GST Portal which was in nascent stage during the initial months after its implementation on 01.07.2017 and **it was incumbent upon the petitioner to have raised a proper grievance on the GST portal help-desk and ought to have waited for the relevant Form to go live on the GST portal instead of making illegal adjustment by use of the Form GSTR-3B of the transferor and the transferee company and mere shortage of working capital cannot be an excuse to bypass the legal procedure laid down under the law.**

We are of the view that the stand of the Respondent No.2, for rejecting the claim of the petitioner in the **wake of the admitted fact that the GST common portal was not online cannot be justified.** We consequently set aside the order dated 17.04.2023 with liberty to the Respondent No.2 to pass fresh order taking into consideration the objections of the petitioner and also affording it opportunity of hearing, strictly in accordance with law.”

34. From the aforesaid quoted paragraph, it is evident that the Allahabad High Court observed that it was incumbent upon the petitioner therein to raise proper objection and ought to have waited for the relevant Form to go live on the GST portal instead of making illegal adjustment by use of the Form GSTR-3B of the transferor and the transferee company and mere shortage of working capital could not be an excuse to bypass the legal procedure laid down under the law, which *prima facie* supports the contention as raised by the learned AGP for Commercial Taxes that in case of any grievance with respect to filing of electronically or unavailability of such Form on the portal, the grievance could have been raised on GST portal help desk. Though, we are not observing the same as has been observed by the Allahabad High Court, but we find force in the submission of the learned AGP for Commercial Taxes that such grievance should have been raised on GST portal help desk. However, in our view, that would not determine the matter in issue conclusively. If such grievance was not raised on GST portal for some reasons, but the same was raised before the authority even prior to the show cause notice, vide the correspondence mentioned above, the authority who had issued the impugned show cause

notice should consider the said aspect of the matter as well, while considering the petitioner's other objections, if so raised.

35. In ***M/s.Tikona Infinet Private Limited*** (supra) there was admitted position with respect to the non-availability of the Form GST ITC 02 in GST portal for the entire period of 30 days from the registration of the separate business of the entity therein and even on the date of filing of the writ petition. In the present case, such a position is not admitted, which the petitioner would be required to state and establish before the authority.

36. In ***Pacific Industries Ltd.*** (supra) the petitioner therein was deprived from submitting the Form GST ITC-02A online and as a consequence, the petitioner was deprived from availing the Input Tax Credit through Form GSTR-3B. In the said case, such assertion in the writ petition about the non-availability of the Form GST ITC-02A on the GST portal was not denied. Further, consequent upon the petitioner being deprived, for the said reason, in submitting Form GST ITC-02A online, the petitioner therein was deprived as a consequence thereof from availing the input tax credit.

37. In the present case, the petitioner has not been deprived from availing the input tax credit as of now, but the show cause notice has been issued granting opportunity. So, at this stage, it cannot be said that as a consequence of not submitting Form GST ITC-02 electronically, the petitioner has been deprived of the claim of input tax credit. The petitioner has the opportunity and on such opportunity on verification of such fact, the authority has yet to consider the petitioner's claim of input tax credit.

38. The judgments of this Court in ***K.V.Reddy Granites*** (supra) and ***Sri Siddhi Kalko Bhagavan Stone Crusher*** (supra) are on the point of filing of appeal under Section 107 of the APGST Act 2017 and Rule 108 of APGST Rules 2017. In those cases, the appeals were filed manually and not electronically. The appeal is a valuable right which cannot be taken away on the ground of technicalities. So far as utilization of the unutilized and transfer of ITC is concerned, the same is subject to acceptance. The same cannot be equated as right to appeal. The question as involved in the present case was not involved in those two cases.

39. The submission of the petitioner's counsel to read down the provisions of Rule 41 of the CGST Rules and to direct to accept the manual filing, at this stage, deserves rejection, as neither Rule 41 of the CGST Rules is under challenge nor is shown to be contrary to any provision of CGST Act, and particularly when the petitioner has the opportunity before the Authority pursuant to the show cause notice to justify manual filing.

40. For all the aforesaid reasons, we are of the considered view that the petitioner should approach the authority which has issued the show cause notice and file the objections with evidence, and if so desire, to avail the opportunity of personal hearing with due intimation to the authority concerned. At the stage of show cause notice, we are not inclined to entertain the challenge to the said notice, in the absence of any ground of want of jurisdiction of the authority in issue of notice.

41. Since the period granted to the petitioner to file the objections and appear before the authority concerned has already expired, we provide that if the petitioner files objections with evidence and shows his willingness for personal hearing, within a period of one week from the date of receipt of copy of this order to the authority concerned, the same shall be considered and decided, as expeditiously as possible, preferably within 4 (four) weeks from the date of receipt of copy of this order, in accordance with law.

42. With the aforesaid observations and directions, the Writ Petition is dismissed. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

RAVI NATH TILHARI, J

A V RAVINDRA BABU, J

Date: 09.11.2023

Dsr

Note:

Furnish copy in 3 days

&

LR copy to be marked

B/o

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